LIBRARY
SUPREME COURT, U. S.

No. 72-1637

JUN 6 197
MICHAEL RODAK, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

THE MAGNAVOX COMPANY OF TENNESSEE

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

---

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530*

PETER G. NASH,
*General Counsel,*
JOHN S. IRVING,
*Deputy General Counsel,*
PATRICK HARDIN,
*Associate General Counsel,*
NORTON J. COMEN,
*Assistant General Counsel,*
ABIGAIL COOLEY HARKIN,
*Attorney,*
*National Labor Relations Board,*
*Washington, D.C. 20570.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Juridisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| A. The Board's decision | 2 |
| B. The court's decision | 6 |
| Reasons for granting the writ | 6 |
| Conclusion | 11 |
| Appendix A | 13 |
| Appendix B | 16 |
| Appendix C | 18 |


CITATIONS

Cases:


| | |
|---|---|
| *Armco Steel Corp.*, 183 NLRB No. 26, 74 LRRM 1599, reversed on reconsideration, 184 NLRB No. 109, 74 LRRM 1695 | 8 |
| *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 | 6, 7 |
| *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 | 9 |
| *Gale Products, Inc.*, 142 NLRB 1246 | 4 |
| *General Motors Corp.*, 158 NLRB 1723 | 7 |
| *General Motors Corp.* v. *National Labor Relations Board*, 345 F. 2d 516 | 7 |
| *H & F Binch Co.*, 168 NLRB 929 | 7 |
| *Int'l Ass'n of Machinists and Aerospace Workers, District No. 9* v. *National Labor Relations Board*, 415 F. 2d 113 | 6 |
| *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270 | 9 |




504-962—73——1

Cases—Continued Page

*National Labor Relations Board* v. *Erie Resistor Corp* ..... 10

*National Labor Relations Board* v. *Gale Products*, 337 F. 2d 390 ..... 7

*National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, certiorari denied, 350 U.S. 836 ..... 9

*National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702 ..... 6, 9

*National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87 ..... 10

*Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 ..... 8

*Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, certiorari denied, 376 U.S. 971 ..... 9

*United Steelworkers* v. *National Labor Relations Board and Armco Steel Corp.*, 377 F. 2d 140 ..... 7

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*).

Section 7 ..... 2, 4, 5, 8

Section 8(a)(1) ..... 2, 4

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

THE MAGNAVOX COMPANY OF TENNESSEE

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*, pp. 13–15) is reported at 474 F. 2d 1269. The decision and order of the National Labor Relations Board (Pet. App. C, *infra*, pp. 18–49) are reported at 195 NLRB No. 40.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B. *infra*. p. 16) was entered on March 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

employees to pass out union literature at the entrances to the Company's premise, rather than on the premises themselves. (Pet. App. C, *infra*, p. 37; A. 21–22.)

On May 21, 1970, however, the Union requested permission to distribute a union leaflet at the time-clock. On June 25, 1970 the Union requested in writing that the rule be revoked to permit employees to distribute literature on Company property. The Company refused both requests (Pet. App. C, *infra*, 38, 246; A. 23).

The Board found that in the collective bargaining agreement, the Union had acquiesced in a Company rule which nullified the employees' right, guaranteed by Section 7 of the National Labor Relations Act, to distribute union literature during nonworking hours in nonworking areas of the plant. The Board concluded that such Union action was invalid, since it unduly interfered with the employees' right to select or reject a bargaining representative and to be fully informed in other matters related to the exercise of their Section 7 rights, and that the Company violated Section 8(a)(1) of the Act by enforcing its overly broad rule. The Board followed its earlier decision in *Gale Products, Inc.*, 142 NLRB 1246, where it stated (at 1249):

> The validity of a contractual waiver of employee rights must depend * * * upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver. Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlim-

> ited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.
>
> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees * * *.

The Board ordered the Company to cease and desist from maintaining or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization, relating to the selection or rejection of a labor organization as the exclusive bargaining representative of the employees or other matters related to the exercise by employees of their Section 7 rights.[3] (Pet. App. C, *infra*, pp. 25, 47–48.)

---

[3] In *Gale Products*, the Board had held that, although an incumbent union could not waive the employees' right to solicit on behalf of a rival union, it could waive their right to solicit on its own behalf; hence, it merely ordered the employer to cease and desist from prohibiting the distribution of literature on behalf of a labor organization other than the contracting union. In the instant case, the Board, finding no basis in the Act for according more protection to "employees who wish to exercise their Section 7 right to *reject* a union representative" than to "employees who wish to exercise the same Section 7 right to *support* a union representative" (Pet. App. C, *infra*, p. 23), entered an order which covered distribution of literature on behalf of any labor organization.

### B. THE COURT'S DECISION

The court below held that substantial evidence supported the Board's factual findings.[4] But it followed its previous decision in *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621, that a "bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here" (Pet. App. A, *infra*, p. 15). It thus denied enforcement of the Board's order.

### REASONS FOR GRANTING THE WRIT

1. As the court of appeals recognized (App. A, *infra*, p. 14), its holding that a union may contractually waive the employees' right to distribute union literature during nonworking hours in nonworking areas of the plant directly conflicts with *Int'l Ass'n of Machinists and Aerospace Workers, District No. 9* v. *National Labor Relations Board*, 415 F. 2d 113 (C.A. 8). It also conflicts with *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 704–706 (C.A. 5). In those cases, the Eighth and Fifth Circuits upheld the Board's position that the right to distribute union literature is of such fundamental importance to the individual employees that it cannot be waived by their union representative.[5]

---

[4] Thus, it rejected the Union's contention that the contractual provision permitting the Company to issue rules and regulations did not constitute a waiver of the employees' statutory right to distribute union literature (Pet. App. A, *infra*, p. 15).

[5] In *Mid-States Metal*, the Fifth Circuit accepted the Board's then current view that the waiver was invalid only when applied to activities, carried on in opposition to the incumbent union. In

In the *Machinists* case, the court held that "the Union cannot totally waive the employees' rights to distribute literature in nonwork areas of the Company during nonwork time" (415 F. 2d 115). The court stated (*ibid.*) that it was "follow[ing] the Fifth Circuit['s]" holding in *Mid-States* that "the right to distribute literature is a personal right which cannot be waived by a union," and it noted (*ibid.*) that "conflicting results" had been reached by the Sixth and Seventh Circuits. In addition to its decision in the present case, the Sixth Circuit also upheld the union's authority to waive employees' right to distribute literature in *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 and *General Motors Corp.* v. *National Labor Relations Board*, 345 F. 2d 516. The Seventh Circuit so held in *National Labor Relations Board* v. *Gale Products*, 337 F. 2d 390 (C.A. 7); see, also, *United Steelworkers* v. *National Labor Relations Board*, and *Armco Steel Corp.*, 377 F. 2d 140 (C.A. D.C.).

The question whether a union may, by contract, waive the employees' right to distribute union literature, or solicit union membership, during nonworking time in appropriate areas of the plant has been a recurrent problem before the Board and the courts of appeals. In addition to the cases discussed *supra*, see *General Motors Corp.*, 158 NLRB 1723; *H & F*

---

*Machinists*, the Eighth Circuit held that the waiver was invalid even insofar as it applied to support of the incumbent union (415 F. 2d at 115–116), a view which the Board has adopted here.

504-962—73——2

*Binch Co.*, 168 NLRB 929, 935; *Armco Steel Corp.*, 183 NLRB No. 26, 74 LRRM 1599, reversed on reconsideration, 184 NLRB No. 109, 74 LRRM 1695. Cf. *United Aircraft Corp.* v. *National Labor Relations Board*, 440 F. 2d 85, 96 (C.A. 2). The conflicting decisions of the courts of appeals have created an uncertainty and a lack of uniformity in this area which impede the effective administration of the Act, and which require resolution by this Court.

2. Section 7 of the Act guarantees to employees the right "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing," as well as the right "to refrain from any or all of such activities." This guarantee encompasses the right to make a free choice respecting the selection or retention of a bargaining representative, and such freedom in turn presupposes that the employees are adequately informed on matters relevant to that choice.

The plant is the "place uniquely appropriate" (*Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801, n. 6) for employees to obtain this information from their fellow emplyees. Thus, in *Republic Aviation*, the Court sustained the Board's conclusion that a ban on the distribution of union literature, or on the solicitation of union membership, by employees at the plant during nonworking time was an interference with the employees' right to organize, guaranteed by Section 7. Hence, such a ban "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory

in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline" (324 U.S. at 803–804, n. 10).

To be sure, in the collective bargaining agreement the union may not only make rational distinctions among the employees in terms of wages and other conditions of employment,[6] but may waive certain of the employees' statutory rights, such as their right to strike and their right to bargain about subjects within the area of mandatory bargaining.[7] The rationale for permitting waiver by the union of these matters is that "it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 705 (C.A. 5). But, as the Fifth Circuit added (*ibid.*):

> The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage * * *.

---

[6] See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338.

[7] See *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 279–284; *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 750–751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836.

That is, the right to choose or change a bargaining representative is not dependent upon collective action for its effectiveness, but can be exercised by each employee individually. Moreover, it is a fundamental freedom which the individual possessed prior to the selection of a representative, and it is important to him that it not be diminished by such selection, particularly since the employee's interest may not always coincide with that of the incumbent representative. Accordingly, the Board was reasonable in concluding that the employees, in initially selecting a representative, may not be deemed to have authorized it to negotiate a contract which waives their right to receive information necessary to enable them intelligently to decide whether the representative should be retained or replaced by another, or whether the employees should forego further representation altogether. The court below, in reaching a contrary conclusion, thus impermissibly intruded upon the Board's function of striking a balance among "conflicting legitimate interests" which will "effectuate national labor policy." *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96; see also *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD,
*Solicitor General.*

PETER G. NASH,
*General Counsel.*
JOHN S. IRVING,
*Deputy General Counsel.*
PATRICK HARDIN,
*Associate General Counsel,*
NORTON J. COME,
*Assistant General Counsel,*
ABIGAIL COOLEY BASKIR,
*Attorney,*
*National Labor Relations Board.*

JUNE 1973.

## APPENDIX A

**United States Court of Appeals for the Sixth Circuit**

**No. 72-1121**

**No. 72-1201**

**On Separate Petitions to Review and On Cross-Application for Enforcement of an Order of the National Labor Relations Board.**

THE MAGNAVOX COMPANY OF TENNESSEE, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

---

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO AND ITS LOCAL 796, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**Decided and Filed March 8, 1973.**

Before EDWARDS and MCCREE, Circuit Judges and CECIL, Senior Circuit Judge.

PER CURIAM. We consider petitions to review and a cross-application for enforcement of an order of the National Labor Relations Board. The Decision and Order of the Board is reported at 195 N.L.R.B. No. 40. The petitions have been consolidated for hearing and disposition.

The complaint charged that the company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1),

by prohibiting its employees from distributing literature on behalf of the Union during the employees' non-working time in non-working areas of the company's premises. The Board found that for many years the company has maintained a rule prohibiting the distribution of literature on its parking lots and on other company property. Although the Board determined that such a rule is presumptively invalid under the standards in *Stoddard Quirk Manufacturing Company*, 138 N.L.R.B. 651, it observed that the company had interposed as a defense to the complaint the contention that the Union had contractually waived any objection it might have to the no distribution rule.

It then determined that the Union could not contractually agree to the prohibitions of the no-distribution rule to restrict the dissemination of literature in opposition to any labor organiation or on behalf of any labor organization. In this respect, it amended its *Gale Products* rule[1] and followed the decision of the Eighth Circuit in *Int. Ass'n. of Mach. & Wkrs. Dist. No.* 9 v. *N.L.R.B.*, 415 F. 2d 113 (1969). It

[1] In *Gale Products, Div. of Outboard Marine Corp.*, 142 N.L.R.B. 1246, *enforcement denied* 337 F. 2d 390 (7th Cir. 1964), the Board held that although certain statutory right may be waived by a labor organization on behalf of employees whom it represents, an unlimited contractural prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act to select or reject a bargaining agent. Accordingly, it determined that a bargaining representative could waive solicitation on its own behalf but could not waive the right of employees to solicit on behalf of a labor organization other than the contracting one. Following *Gale* in another case, the Board said, "neither an employer nor an incumbent union is entitled to attempt to freeze out another union by waiving the employees' right to urge a change in their collective-bargaining representative." *General Motors Corporation*, 158 N.L.R.B. 1723, 1726 (1965).

elected not to follow the rule in our circuit enunicated in *Armco Steel Corporation* v. *N.L.R.B.*, 344 F. 2d 621 (1965), and in *General Motors Corporation* v. *N.L.R.B.*, 345 F. 2d 516 (1965). The Board's order required the company to cease and desist from maintaining or enforcing any rule which prohibits distribution in non-working areas on non-working time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or other matters related to the exercise of Section 7 rights. It also required posting of appropriate notices.

We determine that substantial evidence on the records as a whole supports the Board's factual findings. However, on a less restricted review we might have found that the contract provision [2] permitting the company to issue rules and regulations did not waive the right to distribute literature even in the context of a preexisting no-distribution rule.[3] Waiver of a right of such importance should be the subject of an express provision.

However, we are not persuaded that our ruling in *Armco Steel* should be overturned at this time, and we adhere to the position that the bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here. The petition of Magnavox to review is granted and the order will be set aside and enforcement will be denied.

Enforcement denied review granted.

---

[2] "The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature. . . ."

[3] "You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property."

## APPENDIX B

**United States Court of Appeals for the Sixth Circuit**

**No. 72-112**

**No. 72-1201**

THE MAGNAVOX COMPANY OF TENNESSEE, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO AND ITS LOCAL 796, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Before: EDWARDS and MCCREE, Circuit Judges and CECIL, Senior Circuit Judge.

On petitions to review and cross-application to enforce an order of the National Labor Relations Board,

These consolidated causes came on to be heard on the transcript of the record from the National Labor Relations Board and were argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition of Magnavox Company of Tennessee to review is granted and enforcement of the Order of the National Labor Relations Board is denied.

It is further ordered that Petitioner, Magnavox Company of Tennessee, recover from Respondent and Petitioner, International Union, the costs on appeal as itemized below.

Entered by order of the Court.

JAMES A. HIGGINS,
*Clerk.*

Issued as Mandate: April 12, 1973.
Costs: To be recovered by Magnavox.
Printing brief and appendix, $2,527.54.

ATTEST:
A true copy.

JAMES A. HIGGINS.

## APPENDIX C

**United States of America before the National Labor Relations Board**

**Case 10—CA—8555**

**THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO–CLC AND ITS LOCAL 796**

**DECISION AND ORDER**

On April 28, 1971, Trial Examiner Abraham H. Maller issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief. Respondent also filed a brief in reply to the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings,[1] findings, and conclusions and to adopt his recommended Order as modified below.

---

[1] In its exceptions, the Charging Party argues that it was error for the Trial Examiner to permit the Respondent to introduce evidence with respect to its "contractual waiver" claim because the Respondent did not allege such a waiver as an affirmative defense in its answer to the complaint. In light of our ultimate decision in this case, we find it unnecessary to pass on this alleged error. We note, however, that neither the Union nor the

1. For many years Respondent has maintained a rule prohibiting the distribution of literature on Respondent's parking lots and on other company property. The Trial Examiner further found that this rule was presumptively invalid under the standards declared in *Stoddard-Quirk Manufacturing Company*[2] and that, as applied to employee distribution of organizational literature in nonworking areas on nonworking time, the rule was not justified by any extraordinary operational or disciplinary needs of Respondent. We affirm these findings.

As noted above,[3] however, Respondent has interposed as a defense to the complaint the claim that the Union had contractually waived any objection it might have to the no-distribution rule. In passing on that claim, the Trial Examiner found that the terms of the collective-bargaining contract between the Respondent and the Union made no explicit reference to the no distribution rule. But, interpreting the contract's terms in light of the historical relationship of the parties, he agreed with the Respondent that the contract implies the Union's acquiescence in the maintenance and enforcement of the rule. We arrive at a similar conclusion in light of the following undisputed facts: (1) The contract terms expressly reserve to the Respondent broad rulemaking powers; (2) the contract clauses currently describing the reserved manage-

---

General Counsel claimed surprise at the introduction of this evidence, and that Respondent relied on exhibits introduced by the General Counsel to support its position. Therefore, we do not believe the "waiver of defenses" rule applies to Respondent under these circumstances. Moreover, as the issue of contractual waiver was fully litigated by all parties, the Trial Examiner's ruling is not prejudicial.

[2] 138 NLRB 615, 621.

[3] See fn. 1, *supra*.

ment powers have appeared in all prior contracts of the parties over the 16-year period of their bargaining relationship; (3) the no-distribution rule, as now maintained, was in existence when the first contract between the parties was negotiated and has been in force continuously ever since; and (4) neither the Union nor the employees have heretofore challenged Respondent's right to maintain and enforce the rule, but rather have accepted and obeyed its terms.

2. The Trial Examiner made it clear in his Decision that he would have dismissed the complaint were it not for the inhibiting effect the rule might have on those employees who might wish, during the course of the contract's term, to exercise their basic Section 7 right to oust their bargaining representative. But in deference to *Gale Products*[4] and its progeny, the Trial Examiner (a) found the alleged violation of Section 8(a)(1) of the Act based on Respondent's maintenance of the rule and (b) recommended, as a remedy, Respondent's rescission of the rule to the extent that it forbids the employees' distribution of organizational literature on behalf of any union other than the present incumbent during nonworking time and in nonworking areas.

Respondent, in its exceptions, questions the validity of the *Gale Products* rule and asks us, in effect, to reexamine that rule in light of its rejection by the Court of Appeals for the Seventh Circuit and the subsequent decisions of the Court of Appeals for the Sixth Circuit.[5]

---

[4] *Gale Products, Div. of Outboard Marine Corp.*, 142 NLRB 1246, enforcement denied 337 F. 2d 390 (C.A. 7).

[5] *Armco Steel Corporation* v. *N.L.R.B.*, 344 F. 2d 621; *General Motors Corporation* v. *N.L.R.B.*, 345 F. 2d 516.

In *Gale Products*, the Board said, in pertinent part:

> The validity of a contractual waiver of employee rights must depend . . . upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver. Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.
>
> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees. . . . [142 NLRB at 1249.]

These views have since been approved by the Courts of Appeals for the Fifth and Eighth circuits in cases where basically the same issue was involved.*

We have reexamined the Board's holding in *Gale Products* under the additional light cast thereon by these decisions. We are persuaded that we should adhere to what was said in *Gale Products* concerning the consideration to which paramount weight must be accorded in resolving issues of the kind before us here. The Board's judgment, as above expressed, appropriately envisages, so we believe, the Board's performance of the duty imposed upon it by the Act to protect the basic organizational rights granted to individual employees against encroachment by either employers

---

* *N.L.R.B.* v. *Mid-State Metal Products, Inc.*, 403 F.2d 702 (C.A. 5); *International Association of Machinists and Aerospace Workers, District No. 9* [*McDonnell Douglas*] v. *N.L.R.B.*, 415 F.2d 113 (C.A. 8).

or unions.[7] But, given the basic premise of *Gale Products* that an overly broad no-distribution rule hampers the Section 7 rights of individual employees to select a bargaining representative—even though that rule is sanctioned by a union-employer contract—we have difficulty in accepting as valid the two-sided remedy fashioned in *Gale Products*.[8] Certainly, we find noth-

[7] We do, of course, acknowledge that, although the right to strike is also protected by the statute, the Supreme Court has held that a waiver of that right in a collective-bargaining agreement is, in normal circumstances, binding on the unit employees involved. However, as the Supreme Court further indicated, the binding effect of such a waiver is subject to the *proviso*, that the "*selection of the bargaining representative remains free. . . .*" *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 280. Analyzing the possible effect of the Supreme Court's decision on the Waiver issue here involved, the Court of Appeals for the Fifth Circuit said in the *Mid-States Metal Products* case, footnote 6, *supra*, 403 F.2d. at 704:

"The Act 'was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than a grant of power to the union.'

* * * * *

"The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage." [Citations omitted.]

[8] Member Jenkins has heretofore expressed his disapproval of this aspect of *Gale Products* in his dissenting opinion in *General Motors Corporation*, 147 NLRB 509, 514. As set forth hereinafter, Chairman Miller and Member Kennedy agree with Member Jenkins' position.

ing in the statutes to suggest that employees who wish to exercise their Section 7 right to *reject* a union representative are entitled to more protection than employees who wish to exercise the same Section 7 right to *support* a union representative. This was pointed out by Court of Appeals for the Sixth Circuit when it reversed the Board's decision in *Armco Steel*, in which the order was fashioned after that in *Gale Products*. There the court said:

> Under Section 9 of the Act, the collective bargaining representative was the exclusive representative of *all* the employees, which included dissident as well as those who were loyal to the incumbent. It was the Board who divided Armco's employees into two classes and held the collective bargaining agreement invalid as to dissident and valid as to loyal employees supporting the representative. The purpose of the National Labor Relations Act is to promote industrial peace. Policy making decisions of the Board favoring employees supporting a rival union over those loyal to the incumbent would seem to us to have the opposite effect. [344 F.2d at 624.]

The Eighth Circuit, although enforcing our decision in *Machinists* v. *N.L.R.B.*, footnote 6, *supra*, took issue with that part of our order which, out of deference to a bargaining contract's terms, would have subjected employees who chose to support the contracting union to the prohibitions of the no-distribution rule while at the same time exempting dissident employees from such prohibition. The court therefore expressly added

504-962—73——4

to our order language that would insure to *all* employees equal literature distribution rights "*on behalf of any labor organization or in opposition to any labor organization.*" (Emphasis supplied.)

Upon due reflection, and with all due respect to the adverse decisions of the Courts of Appeals for the Sixth and Seventh Circuits, we believe the course mapped out for us by the decision of the Eighth Circuit in *Machinists* v. *N.L.R.B., supra,* and earlier suggested by the Fifth Circuit in *Mid-States Metal Products, supra,* best serves to effectuate the fundamental purposes of Section 7 of the Act and the rights it guarantees.

We therefore feel it appropriate to modify the remedy announced in *Gale Products* and followed in related cases, insofar as that remedy prohibits employee distribution of literature by or on behalf of members of an incumbent labor organiation which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their Section 7 rights.[9] We shall reframe the remedial order accordingly.

---

[9] As our holding is concerned solely with the exercise by *employees* of their Section 7 rights, it is not to be taken as licensing in any way the distribution of institutional—as distinguished from purely organizational—literature of a labor organization which has acquiesced in an employer's promulgation or maintenance of a broad no-distribution rule.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that the Respondent, The Magnavox Company of Tennessee, Greeneville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, with the following modifications:

1. Delete paragraph 1 and substitute the following:

"Cease and desist from maintaining, giving effect to, or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or other matters related to the exercise by employees of their Section 7 rights."

2. Substitute the attached notice for the notice of the Trial Examiner.

Dated, Washington, D.C.

EDWARD B. MILLER,

*Chairman.*

HOWARD JENKINS, JR.,

*Member.*

RALPH E. KENNEDY,

*Member.*

NATIONAL LABOR RELATIONS BOARD.

[SEAL]

MEMBER FANNING, concurring:

Respondent is charged with restraining and coercing its employees in their exercise of Section 7 rights because it has invoked against the Union a long-established rule against distribution of union literature anywhere on its premises. As a defense to the charge, Respondent cites a provision in its collective-bargaining agreement with the Union which states:

> The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with this agreement.

Respondent contends that by agreeing to these provisions the Union has given Respondent the contractual right to promulgate the rule in question and has waived its statutory rights and the statutory rights of its supporters to disseminate union literature on plant premises.

The Trial Examiner, relying on the *Gale Products* decision,[10] found no violation in Respondent's invocation of the rule to ban the Union's proposed distribution, but found a violation in the continued maintenance of the rule insofar as it operated to discourage solicitation and distribution of literature by employees on behalf of another labor organization. He therefore recommended that Respondent be ordered to cease and desist from giving effect to or enforcing any rule which prohibits any employees from distrib-

---

[10] *Gale Products, Div. of Outboard Marine Co.*, 142 NLRB 1246, enforcement denied 337 F.2d 390 (C.A. 7).

uting literature during nonworking time and in nonworking areas on behalf of any union other than the incumbent Union.

Quite clearly the Trial Examiner is correct in finding that the mere maintenance of the rule involved herein has an inhibitory effect on the exercise of Section 7 rights by employees who would seek to support another union. He is also correct in holding that, under the *Gale Products* rule, the fact that the incumbent Union has impliedly agreed to such restriction is an insufficient basis for permitting it to remain in effect. However, if we strike down the rule as applied to such activities, we can hardly, on the facts of this case, permit it to stand as a bar to similar activities on the part of the Union or its supporters. This is not a case in which the Union has explicitly agreed not to engage in organizational activities on plant premises. It has agreed only to abide by rules issued by the Respondent for the maintenance of orderly conditions on plant premises provided the rules are not unfair or discriminatory. The Union has not acquiesced in a rule which would be applied against it and its supporters but not against activities in support of another union, for such a rule would be unfair and discriminatory. As Respondent is precluded by law (*Gale Products*) from maintaining the rule in question against distribution on behalf of another union, the contractual provision requiring any rules issued by Respondent to be fair and nondiscriminatory preclude Respondent from maintaining the rule only against the Union. I, therefore, find that Respondent violated Section 8(a)(1) when it refused the Union permission to distribute literature during nonworking time,

and I join my colleagues in striking down the entire rule.[11]

JOHN H. FANNING,
*Member, National Labor Relations Board.*

---

[11] Heretofore, we have dealt with this issue in the context of employer action enforcing an explicit contractual agreement restricting employees' organizational activities against activity in support of a union other than the contracting union. We have not had occasion therefore to consider whether the contractual language sufficed to justify a restriction solely on such activity by the contracting union or its supporters.

I disagree with the order only insofar as it may be read to permit restrictions on the distribution of literature in working areas when work is not being performed in such areas. See my dissenting opinion in *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 625–631.

## APPENDIX

### NOTICE TO EMPLOYERS

**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATES GOVERNMENT**

**WE WILL NOT maintain, give effect to, or enforce any rule which prohibits our employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or pertaining to other matters related to the exercise by employees of the rights guaranteed to them by the National Labor Relations Act, as amended, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.**

**THE MAGNAVOX COMPANY OF TENNESSEE**
**(Employer)**

**Dated** _____ **By** _____
**(Representative)** **(Title)**

**This is an official notice and must not be defaced by anyone.**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building, room 701, 300 Peachtree Street NE., Atlanta, Ga. 30308, telephone 401–526–5760.

United States of America, Before The National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Case No. 10–CA–8555

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO–CLC AND ITS LOCAL 796

*Alan L. Roolnick, Esq.*, of Atlanta, Ga., for the General Counsel.

*George K. McPherson, Jr.*, and *James A. Smith, Esqs.* (*Smith, Currie and Hancock*), of Atlanta, Ga., for the Respondent.

*Ronald H. Janetzke, Esq.*, of Kettering, Ohio and *Mr. Richards Fisher*, of Afton, Tenn., for the Charging Party.

TRIAL EXAMINER'S DECISION

ABRAHAM H. MALLER, Trial Examiner: On August 27, 1970, International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC and its Local 796, herein called the Union, filed a charge against The Magnavox Company of Tennessee, herein called the Respondent. Upon said charge, the Regional

Director for Region 10 of the National Labor Relations Board, herein called the Board, issued on behalf of the General Counsel a consolidated complaint against the Respondent. Briefly, the complaint alleged that the Respondent has maintained and enforced in its plant a rule prohibiting the soliciting of any kind on company property during working hours, and on or about May 21, 1970, by maintaining and enforcing said rule, Respondent has prohibited its employees from distributing literature on behalf of the Union during employees' nonworking time in nonworking areas of Respondent's premises, in violation of Section 8(a)(1) of the National Labor Relation Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act. In its duly filed answer, the Respondent denied any violations of the Act.

Pursuant to notice, a hearing was held before me at Greenville, Tennessee, on February 9 and 10, 1971. All parties were represented at the hearing and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument and to file briefs with me. Helpful briefs were filed by all parties. Upon consideration of the entire record [1] and the briefs, and upon my observation of each of the witnesses, I make the following:

## Findings of Fact

### I. The business of the respondent

Respondent is, and has been at all times material herein, a Tennessee corporation with an office and place of business located at Greenville, Tennessee,

[1] Both the General Counsel and the Respondent have filed motions to correct the record in certain particulars. No opposition to said motions has been filed. Upon consideration of the motions, it is hereby ordered that the record be corrected as requested.

where it is engaged in the manufacture and sale of television and sound products. During the calendar year preceding the filing of the complaint herein, which period is representative of all times material herein, Respondent has sold and shipped finished products valued in excess of $50,000 directly to customers located outside the State of Tennessee. Accordingly, I find and conclude that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction here.

## II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ISSUE

Whether the Respondent by prohibiting its employees from distributing literature on behalf of the Union during employees' nonworking time and in nonworking areas of Respondent's premises has violated Section 8(a)(1) of the Act.

## IV. THE ALLEGED UNFAIR LABOR PRACTICES

### *A. The Facts*

The Union was first certified as the collective-bargaining representative of Respondent's employees in the latter part of 1954 or early in 1955. Prior to and at the time of the Union's initial certification, Respondent maintained and had distributed to employees an employee handbook which contained the following statement: "You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property." It is undisputed that the Re-

spondent has at all times treated the foregoing statement as a rule and has prohibited the distribution of notices or handbills with the few exceptions noted *infra*.[2]

Following the Union's certification, the parties entered into negotiations resulting in a collective-bargaining agreement governing wages, hours, and working conditions. This collective-bargaining agreement was effective for a 1-year period commencing on April 30, 1955. During these contract negotiations, the union negotiating committee was headed by one, Edward Lingo, a CIO representative on loan to the Union. It was stipulated by the parties at the hearing that Lingo was instrumental in organizing Respondent's employees and negotiated at least the first two collective-bargaining agreements between the parties, and that in doing so he was acting as agent of the Union.

During the course of the negotiations, the Union proposed a negotiating of the rules and making them part of the contract. The Respondent opposed this and contended that it, alone, should make the rules and the Union should have the right to protest if it felt that the rules were discriminatory. The Union inquired whether the Respondent had any intention of making rules beyond those which were in the employee handbook which was in effect at that time. At a subsequent meeting, the Respondent stated that it had no immediate plans for any change in the rules, but offered a

[2] In another part of the employee's handbook, the Respondent had set forth a section entitled "Plant Rules." One of said rules is the one referred to in the complaint which reads as follows: "The following will not be permitted: . . . 6. Soliciting of any kind on Company Property during working hours." That rule however does not appear to be involved in the instant proceeding.

proposal that it would have the right to make changes when circumstances dictated it. The specific proposal made by the Respondent read as follows:

> The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These plans will not be of a discriminatory nature.

The Union then suggested that there might be rules which might not be discriminatory but would be unfair, and the Respondent agreed to change the language of the last sentence to read: "These rules will not be unfair or of a discriminatory nature." The Respondent's proposal as so modified was accepted and became part of the collective-bargaining agreement (Article XII, paragraph 3).

The initial contract contained a further provision regarding bulletin boards, as follows:

> The Company will provide a Bulletin Board in Plant I and a Bulletin Board in Plant II each of which will be used exclusively for the posting of Union Notices. Such notices must be approved by the Director of Industrial Relations or his designated representative and will be placed on the boards by the Personnel Department. It is understood that such notices will be automatically approved unless they are of a controversial nature. These Bulletin Boards will be labeled "Local 796, IUE–CIO."

There have been six collective-bargaining agreements between the Respondent and the Union. The most recent one was effective July 1, 1968, and is to remain in effect for 3 years, and from year to year thereafter unless notification of termination, modification, or amendment is given by either party as prescribed therein. Each of said agreements has contained a provision giving the Respondent authority to make and enforce rules and regulations and provides

for the maintenance of bulletin boards furnished by the Respondent for the benefit of the Union. All of these provisions are essentially identical to those contained in the 1955 collective-bargaining agreement.[3]

On March 21, 1956, a decertification election was conducted at Respondent's plant. During the campaign preceding that election, Union Representative Lingo telephoned Byron Sites, Respondent's Director of Industrial Relations, and complained that employees opposed to the Union were distributing Literature on Respondent's property, while those supporting the Union were prohibited from engaging in such activity. Sites assured Lingo that he was not aware that this had taken place and that he would take immediate steps to prohibit such action. Lingo confirmed the foregoing telephone conversation by letter dated March 15, 1956, which reads in pertinent part as follows:

> It has been called to our attention that on several occasions handbills have been distributed in the plant by the "Committee for Independent Action."
>
> By the same token, yesterday, employees distributing our handbill have been denied this right. Yesterday, they were driven off company property by one of your plant guards.

---

[3] In the most recent agreement, the provision giving the Respondent the right to make rules and regulations reads as follows:

"The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement."

The section regarding bulletin boards now provides for one bulletin board in Plant #1, two bulletin boards in Plant #2, and six bulletin boards in Plant # 3.

Please consider this letter a request that our members be allowed an opportunity to distribute handbills in the plant as has our opposition.

On the same day, Sites replied as follows:

In reference to your letter of March 15, any action by any employee in distributing hand bills on Company property was strictly without authorization and in violation of Company rules. Various steps have been taken to prevent such incidents and the following letter today is being addressed to all of our supervision in a further effort to control the matter.

"In this period preceding the election we are faced with the problem of maintaining normal work conditions. It has been called to my attention that people have been bringing in various types of propaganda material and distributing it inside the plant. This is a violation of our rules and must be stopped immediately. If you find any employee engaging in this practice order him to cease immediately and if he fails to abide by your instructions take him to the Personnel Office for disposition of the matter."

We feel that it is improper to permit this type of campaigning within the plant by either party and therefore must refuse your request to permit such distribution.

For more than 16 years, antedating the time of the Union's initial certification to the present, the Respondent has maintained the rule prohibiting all distribution of literature on company property by any persons, including Respondent's employees. Throughout this extended period, the Union has frequently distributed handbills to Respondent's employees as they were coming to or leaving work. The distributors, however, have always stood at the gates off of company property to make their distributions. Through-

out that period, the Union has never filed a grievance protesting the Respondent's no-distribution rule nor has it ever attempted to secure a change of the Respondent's rule through the negotiation process. The Union's officers have always instructed the employees to pass out union literature at the entrances to the Company's premises and not on the premises themselves.

On numerous occasions, civic organizations, political candidates, and local merchants have requested permission to distribute literature to Respondent's employees on its property. These requests have uniformly been denied. The only distribution ever allowed on Respondent's premises occurred in 1965, when the Respondent allowed the Union to distribute a pamphlet to employees. This pamphlet concerned the "City of Hope," a charity supported by the Union. The distribution occured prior to the Union's solicitation for the charity and was allowed by the Respondent only after the president of the local union specifically requested permission to make the distribution. The Respondent also permitted, indeed encouraged, the employees to distribute literature for the United Fund on company time and property. On one occasion, Respondent distributed its monthly magazine to the employees on company property. Respondent also has a newspaper which it publishes every Wednesday. This publication is placed in boxes located throughout the plant. It is not uncommon for employees to pick up a number of the weekly papers and distribute them to fellow workers in the plant.

During the entire time that the Union has acted as the representative of Respondent's employees, the Respondent has never refused a request to post a notice on the bulletin boards allocated for the

Union's use in the plant. On only one occasion in all that time did a question arise concerning the language of a proposed notice, and the Union and the Respondent promptly worked out acceptable language. The Respondent has always cooperated with the Union in ensuring that the notices which the Union wished to have posted were placed upon the bulletin boards immediately.

On May 21, 1970, the Union requested permission to distribute a union leaflet at the timeclock. Permission was denied by the Respondent. On June 25, the Union's counsel in writing requested the Respondent to allow employees to distribute literature in nonwork areas of the plant on the employees' own time. On July 16, Respondent's counsel wrote the Union, pointing out that by virtue of the collective-bargaining agreement the Union had waived its right to distribute literature on company property. The letter further pointed to the existence of the bulletin boards for posting union notices and the further fact that the Respondent had provided the Union with current lists of the names and addresses of its employees.

In rebuttal, the General Counsel produced the following evidence to demonstrate that alternative methods of communication available to the Union are not sufficient for it to communicate with the unit employees and its members for the following reasons: The mailing of leaflets and notices involves a mailing expense of approximately $400 per mailing. Many letters are returned because members do not keep the Union appraised as to changes of address. Door-to-door distribution is impractical because of the great number of employees involved and because employees' residences are scattered over a large area, including some in the State of North Carolina. Plant entrance-exit distribution has proved inadequate because there

is danger that the leaflet distributors may be hit by cars, inclement weather, and the distribution to occupants of automobiles creates traffic jams and hazards, and causes employees to be late for work. Bulletin board posting is not satisfactory because members do not read the bulletin boards. On one occasion, the Union had a leaflet prepared but did not submit it to the Respondent for fear that the Respondent would reject it for posting as being controversial. Communication at monthly union meetings is not satisfactory because attendance at such meetings is light and nonmembers do not attend union meetings.

### *B. Concluding Findings*

There is no question but that the prohibition against the distribution of notices or handbills, set forth in the employee handbook, though expressed as a request, had the force and effect of a rule. It was enforced by the Respondent as a rule, and was accepted and observed by the Union and by the employees as such.

The rule, applicable as it was "in the parking lots or on other Company property," is presumptively invalid. Indeed, the following language of *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 621, is particularly applicable in the instant case:

> . . . the no-distribution rule maintained by the Respondent is presmuptively invalid on its face, as applied to employees who may wish to distribute union literature, since its reach is not limited to working time or to the working areas of the plant. We also find that the presumption of invalidity is not overcome by the testimony of Carson Butcher, Respondent's vice president, that the rule was adopted years age for the purpose of "keep[ing] down the litter . . . [and] fire hazards . . . in the plant." The mere asser-

tion that a broad no-distribution rule has this purpose hardly proves that it is actually "necessary" for the employer to prohibit union handbilling by his own employees in nonworking areas in order to "maintain production or discipline" (*Babcock & Wilcox, supra*). Such necessity has not been shown here.

In the instant case, no evidence of necessity whatsoever has been shown.

Respondent, however, contends that the presumption of invalidity is overcome by the fact that the Union in the first instance and repeatedly thereafter waived any objection to the broad no-distribution rule. Respondent's position has merit and should be sustained. The rule in its present form was in effect when the Union was certified and, in the first and in each of the succeeding collective-bargaining agreements, the Union agreed to a management-prerogative clause giving the Respondent the power to make rules, thereby incorporating by implication the existing rules and giving the Respondent the right to make new rules. That the Union was aware of the broad no-distribution rule when it agreed to the management-prerogative provision is not open to question. Moreover, in the ensuing relationship between the parties over a period of 16 years, the Union acquiesced in Respondent's enforcement of the broad no-distribution rule.

The management-prerogative provision does not stand alone. On its part, the Respondent in the original contract agreed to maintain two bulletin boards (increased to nine in the current agreement) for the Union's exclusive use. Both the provision for the maintenance of union bulletin boards and the provision giving the Respondent the right to make rules are contained in Article XII of the original and succeeding contracts. The juxtaposition of these provisions

is significant. It suggests a *quid pro quo* for the Union's acceptance of the Respondent's right to prohibit distribution of union literature on company property. Cf. *General Motors Corporation,* 158 NLRB 1723, 1727.

That the Union may waive statutory rights is not open to question. Thus it is well settled that a union may waive the right of employees to strike.

The General Counsel and the Charging Party argue that waiver by the Union may not be found to have occurred in this case, because waiver will not readily be inferred, but there must be a clear and unmistakable showing that the waiver occurred, and that the Union bargained away its statutory rights. They rely upon *Beacon Piece Dyeing and Finishing Co., Inc.,* 121 NLRB 953, 956, and a long line of cases implementing this policy. These cases are not controlling. They involve situations in which the collective-bargaining agreement is silent on the rights alleged to have been waived, or where the changes unilaterally effected by the Employer exceeded the powers reserved to him in the collective-bargaining agreement. E.g., *C & C Plywood Corporation,* 148 NLRB 414, 417. Hence, the bargaining negotiations in those cases were examined to determine whether the union had, in fact, bargained away its rights. In the instant case, the waiver was explicit and was set forth in each contract. Even if, *arguendo,* there were any doubt as to incorporation by implication of the existing broad no-distribution rule in the explicit management-prerogative provision, such doubt has been effectively erased by the construction which the parties themselves have placed on the provision. Thus, for 16 years, the parties have consistently interpreted the contracts as prohibiting the distribution of union literature on company

property. As the Supreme Court said in *Insurance Co.* v. *Dutcher*, 95 U.S. 269, 273:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. . . . Parties in such cases often claim more, but rarely less, than they are entitled to.

See, also, *N.L.R.B.* v. *Local 825, Operating Engineers*, 315 F. 2d 695, 699 (C.A. 3), enforcing 135 NLRB 578; *Williston on Contracts*, 3rd ed., Sec. 623, Vol. 4, pp. 789–790.[4]

The record is clear that Respondent's enforcement of the no-distribution rule has not been discriminatorily applied against the Union. It is undisputed that the Respondent has steadfastly refused requests by civic organizations, merchants, and political candidates to distribute literature on its premises. There have been only isolated exceptions: The Respondent on one occasion granted the request of the Union to distribute literature on behalf of the City of Hope, a charitable institution supported by the Union. As this request was made by the Union, the granting of it can hardly be termed discriminatory. Also, as noted above, the Respondent permitted employees to distribute literature and to solicit for the United Fund on company property and time. But as pointed out in *Emerson Electric Co., etc.*, 187 NLRB No. 33, n. 2, isolated instances of permissible solicitation for beneficent causes do not establish disparate application of a rule

[4] While the Union has waived its right to object to the no-distribution rule during the term of the current contract, it is, of course, free to negotiate the entire question of rules when bargaining for a new contract.

prohibiting solicitation. Nor is it significant that the Respondent on one occasion distributed its monthly magazine to employees on company property, and places its weekly newspaper in boxes located throughout the plant where they can be picked up by employees. As the Supreme Court pointed out in *N.L.R.B.* v. *United Steelworkers*, 357 U.S. 357 at pp. 363-364:

> Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. Cf. *Bonwit Teller, Inc.* v. *N.L.R.B.*, 197 F. 2d 640, 646; *N.L.R.B.* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 84 (concurring opinion).[5]

In view of the foregoing, as the Union is the charging party in this proceeding, it would be appropriate to recommend dismissal of the complaint, were it not for the fact that the existence of the no-distribution rule would have an inhibiting effect on the employees in the event that some of them might at a future time desire to campaign for the selection of another union as their collective-bargaining representative. As the Board pointed out in *Gale Products, Div. of Outboard Marine Corp.*, 142 NLRB 1246, 1249:

> The validity of a contractual waiver of employee rights must depend, however, upon whether the interference with the employees' statutory rights is so great as to overside any legitimate reasons for upholding the waiver.

[5] There is no evidence, indeed there is not even the suggestion in the record, that the Respondent's literature was anti-union in character as was the case in *United Steelworkers*.

> Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.

See, also, *General Motors Corporation, etc.*, 147 NLRB 509.

Following its holding in *Gale* and *General Motors, supra*, the Board said that "neither an employer nor an incumbent union is entitled to attempt to freeze out another union by waiving the employees' right to urge a change in their collective-bargaining representative" *General Motors Corporation*, 158 NLRB 1723, 1726. Accordingly, the Board has sustained the defense of waiver of broad no-distribution rules only insofar as the waiver applied to the distribution of literature by the union.[4] To the extent, therefore, that the rule prohibits the employees from distributing literature, other than that of the Union, during nonworking time and in nonworking areas of Respondent's premises, it is invalid and violates Section 8(a)(1) of the Act, and I so find.

While relying on the foregoing decisions as to the power of the Union to waive its right to distribute

[4] Respondent argues that there is no move at present to unseat the Union as the collective-bargaining representative; hence, there is no necessity to consider the validity of the broad no-distribution rule in a nonexisting context. The absence of a move to unseat the Union is not significant. The Board has in the foregoing cases emphasized its concern for protection of the rights of employees to select and change their collective-bargaining representative. Consequently, it would be inconsistent with established Board policy for the Board, by dismissing the instant proceeding, to place its imprimatur on a rule which would obviously have an inhibiting effect on employees desiring to campaign for another collective-bargaining representative at a future time.

literature on company premises, Respondent asks that I go further and hold that the Union's waiver is complete and should not be limited to the Union *qua* Union, but should apply to all employees. Respondent argues that, as the certified collective-bargaining representative of all employees, the Union had the power to, and did, waive the right of all employees to distribute literature on company premises. Respondent points to the fact that the Court of Appeals for the Seventh Circuit has denied enforcement of the Board's decision in *Gale,* holding the waiver to be complete. 337 F. 2d 390. Respondent also cites the fact that the Sixth Circuit, in whose jurisdiction Respondent's plant is located, has disagreed with the limitation which the Board place upon the no-distribution rule in *General Motors Corporation, etc.,* 147 NLRB 509, 345 F. 2d 516. See, also, *Armco Steel Corporation,* 344 F. 2d 621 (C.A. 6), denying enforcement of 148 NLRB 1179.

The argument is misaddressed to me. As a Trial Examiner of the Board, it is my "duty to apply established Board precedent which the Board or the Supreme Court has not reversed" (*Insurance Agents' International Union,* 119 NLRB 768, 773). The Board has not acquiesced in the foregoing court decisions, but has expressed its respectful disagreement with them. *Armco Steel Corporation,* 183 NLRB No. 26, *General Motors Corporation,* 158 NLRB 1723, 1726; *Armco Employees Independent Federation, etc.,* 155 NLRB 551, 552, enfd. 377 F. 2d 140 (C.A.D.C.). Moreover, there is a conflict between the circuits. The Fifth and Eighth Circuits have agreed with the Board's holdings in this respect. *N.L.R.B.* v. *Mid-States Metal Products, Inc.,* 403 F. 2d 702 (C.A. 5), enforcing 156 NLRB 90; *International Assn. of Mach. & A. Wkrs., Dist. No. 9* v. *N.L.R.B.,* 415 F. 2d 113 (C.A. 8), enforcing 171 NLRB No. 35.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section IV, above, occurring in connection with the operations of the Respondent set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VI. THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice violative of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing a rule which prohibits employees from distributing literature on nonworking time in nonwork areas, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section

10(c) of the Act, I hereby issue the following recommended:[7]

## Order

Respondent, The Magnavox Company of Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

Cease and desist from maintaining, giving effect to or enforcing any rule which prohibits any employee from distributing literature in behalf of any labor organization other than International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC and its Local 796, where the activity occurs in nonworking areas on nonworking time.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its plants and office in Greeneville, Tennessee, copies of the attached notice marked "Appendix."[8] Copies of the notice on forms provided by the Regional Director for Region 10, after being duly

[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.*

Dated at Wasington, D.C.

ABRAHAM H. MALLER,
*Trial Examiner.*

* In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

## APPENDIX

### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATES GOVERNMENT

**WE WILL NOT** maintain, give effect to, or enforce any rule which prohibits any employee from distributing literature in behalf of any labor organization other than INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO–CLC AND ITS LOCAL 796, where the activity occurs in nonworking areas on nonworking time.

**THE MAGNAVOX COMPANY OF TENNESSEE**

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Peachtree Building, Room 701, 730 Peachtree Street NE., Atlanta, Georgia 30308 (Tel. No. 404—526–5760).



U.S. GOVERNMENT PRINTING OFFICE: 1973

SUPREME COURT, U. S.
72-1637
SEP 4 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*v.*

THE MAGNAVOX COMPANY OF TENNESSEE,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

GEORGE K. McPHERSON, JR.
DANIEL M. SHEA

Attorneys for Respondent
1400 Fulton National Bank Building
Atlanta, Georgia 30303
404—521-3800

## INDEX


Page

Opinions Below ____ 1

Jurisdiction ____ 1

Question Presented ____ 1

Statute and Regulation Involved ____ 2

Statement ____ 3

Argument ____ 5

1. Even If There Is A Conflict Between The Circuit Courts Of Appeal It Is So Insignificant As To Not Warrant Review ____ 6

2. The Right of The Union and The Employees To Distribute Literature Is Not So Fundamental That It Cannot Be Negotiated ____ 12

Conclusion ____ 19


## CITATIONS

**Cases:**


*Armco Steel Corporation v. National Labor Relations Board*, 344 F.2d 621 (6th Cir., 1965) ____ 6

*Gale Products, Inc.*, 142 NLRB 1246 (1963) ____ 5

*General Motor Corporation v. National Labor Relations Board*, 345 F.2d 516 (6th Cir., 1965) ____ 6

*International Association of Machinists and Aerospace Workers, District No. 9 (McDonnell Douglas) v. National Labor Relations Board*, 415 F.2d 113 (8th Cir., 1969) ____ 6

## INDEX (Continued)


Page

*J. I. Case Company v. National Labor Relations Board*, 321 U.S. 332, (1944) ..... 13

*Mason & Hanger-Silas Mason Company v. National Labor Relations Board*, 405 F.2d 1 (5th Cir., 1968) ..... 10

*McDonnell Douglas Corporation v. National Labor Relations Board*, 472 F.2d 539 (8th Cir., 1973) ..... 9

*National Labor Relations Board v. Gale Products, Division of Outboard Marine Corporation*, 337 F.2d 390 (7th Cir., 1964) ..... 6, 7

*National Labor Relations Board v. LeTourneau Company of Georgia*, 324 U.S. 793 (1945) ..... 14

*National Labor Relations Board v. Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir., 1968) ..... 6

*National Labor Relations Board v. Truck Drivers Union*, 353 U.S. 87 (1957) ..... 12

*National Labor Relations Board v. United Steelworkers of America (Nutone)*, 357 U.S. 357 (1958) ..... 15

*Republic Aviation Corporation v. National Labor Relations Board*, 324 U.S. 793 (1945) ..... 14

*Stoddard-Quirk Manufacturing Company*, 138 NLRB 615, 620 (1962) ..... 15

*United Aircraft Corporation v. National Labor Relations Board*, 440 F.2d 85 (2d Cir., 1971) ..... 7

## INDEX (Continued)


Page

*United Steelworkers (Armco Steel Corporation) v. National Labor Relations Board*, 377 F.2d 140 (D.C. Cir., 1966) ..... 7

**Statute and Regulations:**

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 9(a) ..... 2

Section 9(e)(1) ..... 2

National Labor Relations Board Statements of Procedure—Part 101, as amended (24 F.R. 9095, 32 F.R. 9547):

Section 101.18 Investigation of Petition (a) ..... 2, 3

Section 101.18(b) ..... 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

NO. ___

---

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*v.*

THE MAGNAVOX COMPANY OF TENNESSEE,
*Respondent.*

---

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinions below are set forth in the Petition.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

### QUESTION PRESENTED

Whether under the facts and circumstances presented in this case, a duly certified bargaining representative of

employees can waive its right and that of the employees it represents to distribute literature on Company property in non-working areas.

## STATUTE AND REGULATION INVOLVED

The Respondent adds the following relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 33 Stat. 519, 29 U.S.C. 151, *et seq.*):

> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .
>
> * * *
>
> Sec. 9 (e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

The relevant provisions of the National Labor Relations Board, Statements of Procedure — Part 101, as amended (24 F. R. 9095 and 32 F. R. 9547) are as follows:

> Sec. 101.18 Investigation of petition.—(a) . . . The evidence of representation submitted by the petition-

ing labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. . . .

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in subsection (a) of this section.

## STATEMENT

The Respondent adds to the Statement of the Petitioner[1] the following: It is undisputed that the Company had in effect since the initial certification of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC in 1954 or early in 1955, a rule prohibiting all distribution of literature on Company property by any persons, including its employees. (A. 92, 136)[2]

[1] Hereinafter referred to as the Petitioner or Board.

[2] Reference is made to footnote 1 of the Petition which indicates that "A." refers to the appendix to the briefs in the court below, and notes that a copy has been deposited with the clerk of the Supreme Court.

The Union has consistently and without exception recognized and acquiesced in the Company's no-distribution policy. Throughout the years, the Union has frequently distributed handbills to the employees as they were coming to or leaving work. The distributors, however, have always stood at the gates off Company property to make their distributions; and there is no evidence that their efforts were never less than completely successful using this method of distribution. (A. 92, 134, 149, 171-172, 214-215) Throughout this period no grievance has ever been filed protesting the Company's no-distribution policy nor has the Union ever attempted to change the Company's rule through the negotiation process, although several contracts have been negotiated. (A. 94, 136)

On numerous occasions civic organizations, political candidates, and local merchants had requested permission to distribute literature to the Company's employees on its property. These requests had without exception been denied. (A. 112-137)

The only distribution ever permitted on Company premises occurred in 1965 when the Company allowed the Union to distribute a pamphlet to employees. This pamphlet concerned the "City of Hope", a charity supported by the Union. The distribution occurred prior to the Union's solicitation for the charity and was allowed by the Company only after the president of the local Union specifically requested permission that Respondent make an exception to its rule and permit the distribution. (A. 133-134)[3]

The Company offered to prove that there was no organizational drive taking place, or rival-union activity

[3] Reference is made to footnote 2 of the Petition.

at the Company at the time the unfair labor practice charges were filed. (A. 94-96) Although the offer of proof was rejected, the trial examiner assumed that the situation did not exist. (A. 97)

The Board found that the Union had in fact waived the right of all bargaining unit members to distribute literature for any purpose on the Company's premises. The Board, however, abandoning its existing precedent in *Gale Products, Inc.*, 142 NLRB 1246 (1963)[4], concluded that the incumbent Union's waiver was not binding upon any of its bargaining unit members insofar as it permitted the Company to prohibit the employees from distributing literature on behalf of either the incumbent or a rival labor organization "which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their Section 7 rights." (Footnote omitted) (App. C of Petition, page 24)

The Court of Appeals for the Sixth Circuit denied enforcement of the Board order holding that a "bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here." (App. A of Petition, page 15)

## ARGUMENT

Petitioner, National Labor Relations Board, is attempting to obtain a writ of certiorari on two grounds, namely: (1) that the Courts of Appeal of the Sixth and Seventh

[4] Reference is made to footnote 3 of the Petition which describes the Board's decision in the *Gale Products* case.

Circuits have rendered decisions in conflict with the decisions of the Courts of Appeal of the Fifth and Eighth Circuits, on the same matter, and (2) that the right of employees to distribute literature is a fundamental right which cannot be waived through collective bargaining. Respondent respectfully submits that even if there is a conflict between the Circuit Courts of Appeal on the matter involved it is so insignificant as to not warrant review; and to some extent a cause of this, it has been recognized that the right of the employees to distribute literature is not so fundamental that it cannot be waived by the duly authorized bargaining agent of the employees.

## 1. EVEN IF THERE IS A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL IT IS SO INSIGNIFICANT AS TO NOT WARRANT REVIEW.

In support of its argument that there exists a conflict among the Circuits on the ability of a company and a union to contractually waive the employees' right to distribute union literature, the Petitioner cites *National Labor Relations Board v. Mid-States Metal Products, Inc.*, 403 F. 2d 702 (5th Cir., 1968), and *International Association of Machinists and Aerospace Workers, District No. 9 (McDonnell Douglas) v. National Labor Relations Board*, 415 F. 2d 113 (8th Cir., 1969) (which support the position the Board has taken); and, in conflict with these, the decisions of the Sixth Circuit in the instant case as well as in *Armco Steel Corporation v. National Labor Relations Board*, 344 F. 2d 621 (6th Cir., 1965) and *General Motors Corporation v. National Labor Relations Board*, 345 F. 2d 516 (6th Cir., 1965); and the Seventh Circuit in *National Labor Relations Board v. Gale Prod-*

*ucts, Division of Outboard Marine Corporation*, 337 F. 2d 390 (7th Cir., 1964); aligned with these decisions, Petitioner also cites the opinions in *United Steelworkers (Armco Steel Corporation) v. National Labor Relations Board*, 377 F. 2d 140 (D.C. Cir., 1966); and *United Aircraft Corporation v. National Labor Relations Board*, 440 F. 2d 85 (2d Cir., 1971).

In the *Mid-States* case, the company was undergoing anti-union activity, and the Fifth Circuit found that contractually agreed-to broad bans against solicitation *and* distribution anywhere in the plant had been enforced. The court held that the right to distribute union literature was a right "too fundamental to be contracted away by the union as was here done." However, the court went on to say that *"we have no doubt that a bilateral company-union limitation may be agreed upon and maintained if there is proof of unusual circumstances as required to make valid a prohibition unilaterally imposed by the company. But there was no such proof in this case."* (Emphasis added.) 403 F. 2d 702, 706.

In the *Machinists* case, the Eighth Circuit was faced with a broad no-distribution rule contractually negotiated by the company and the union. The court acknowledged the Fifth Circuit holding in *Mid-States*, and ruled that "we are inclined *in this case* to follow the Fifth Circuit and to hold the union cannot *totally* waive the employees' rights to distribute literature in non-work areas of the company during non-work time." (Emphasis added.) 415 F. 2d 113, 115.

In the *Armco Steel* case, traditional rival-union activity was taking place. The Sixth Circuit was asked to review a no-distribution provision of Armco's collective bargaining

agreement. It found that the provision was uniformly enforced against all employees and that there were means of communication with employees alternative to the distribution of union literature on company property. Because the court found this relevant, it held that "whatever right employees had under Section 7 to distribute union literature on company property may be waived by their collective bargaining representative." 344 F. 2d 621, 624. The court adhered to this ruling in the subsequent *General Motors* case, *supra*. The Sixth Circuit in the instant case amended its *Armco Steel* ruling by stating that "the bargaining representative has authority to waive on-premises distribution rights of the employees *at least in the absence of special circumstances not present here.*" (Emphasis added.) (App. A of Petition, page 15)[5] Such a ruling not only indicates a qualification placed on the earlier decision in *Armco Steel*, but evidences the intent of the court to limit its holding in the instant case to the facts and circumstances presented.

In the *Gale Products* case, again the company was faced with rival-union activity, and again, a collective bargaining provision prohibiting distribution *and* solicitation of union literature or union membership on company premises was in effect. The Seventh Circuit found that there was no evidence of discriminatory enforcement of the contract provision and found that the contract provision "did not strip the employees of fundamental rights guaranteed by the Act. The provisions preclude only a con-

[5] In the related case of *United Steelworkers, supra*, the Board, curiously, disregarded its *Gale Products* rule (*supra*, at footnote 4) and deferred to the holding of the Sixth Circuit in *Armco Steel, supra*, and dismissed the charges after reviewing again the same contractual provision in the Armco collective bargaining agreement limiting employee rights to distribute literature.

venient—albeit a most effective—way of their exercise." 337 F. 2d 390, 392. Accordingly, it denied enforcement of the Board order.

In *United Aircraft*, organizational activity was taking place and the collective bargaining agreement provided that there should be no union solicitation during working hours. The Second Circuit after an exhaustive review of the facts did not find "an overriding public interest . . . involved which weighs against finding a waiver of solicitation rights . . . we do not think the ban on solicitation during working hours unduly restricts the unions' access to its members . . .". (Footnote omitted) 440 F. 2d 85, 96-97.

It is evident from the above cases that a conflict, if any, among the Circuits is insignificant. Each of the decisions of the Circuit Courts of Appeals cited by Petitioner recognizes that the validity of a contractual waiver of employees' rights to distribute literature depends upon the facts presented and that there may be exceptions to their holdings based upon such facts and circumstances. This is particularly apparent in light of subsequent decisions in those circuits cited by Petitioner in support of its holding in this case.

The Eighth Circuit recently had occasion to discuss the circumstantial validity of a company-imposed rule[6] limiting solicitation *and* distribution on company property in *McDonnell Douglas Corporation v. National Labor Relations Board*, 472 F. 2d 539 (8th Cir., 1973). As in the

[6] Footnote 2 of the decision indicated that McDonnell Douglas had in effect another no-solicitation, no-distribution rule for the past 14 years. This is conceivably the rule invalidated in the *Machinists* decision which the company through settlement in that case agreed not to enforce.

*Machinists* case, the same company, McDonnell Douglas, and its St. Louis production facility were involved. However, the case was generated not by the Machinists but by its rival-union, the Technical Employees of Aerospace Manufacturers (TEAM), 472 F. 2d 539, 541. Although a contractual waiver was not at issue, the court recognized factors relevant in determining the validity of a contractual waiver. The decision emphasized the significance of the facts as presented in each case, and how the Board should balance the interests involved and not pay merely "lip service" to existing precedent but apply them to the facts. The court held that when a company in attempting to rebutt a presumption of invalidity of its rule which infringes upon Section 7 rights, "makes a creditable showing of special, justifying circumstances, as was done in this case, the Board in weighing that evidence must responsibly and in a meaningful way consider the importance of the proferred justification and thereby determine whether the *actual* impact of the contested rule upon Section 7 rights mandates the invalidation of the rule." (Emphasis added.) 472 F. 2d 539, 545-546.

Less than a month after its decision in *Mid-States*, the Fifth Circuit Court of Appeals again reviewed the question of whether or not a company and a union could contractually prohibit solicitation and distribution on company property in the case of *Mason and Hanger-Silas Mason Co. v. National Labor Relations Board*, 405 F. 2d 1 (5th Cir., 1968). Just as the facts and circumstances of the instant case are clearly distinguishable from the facts and circumstances in *Mid-States* and *Machinists*, the court found:

> The case at bar . . . is clearly distinguishable on its facts from *Mid-States*. The contract clause *sub judice* concerns a prohibition against solicitation *only* on working time. Moreover, the specific Section 7 rights involved in *Mid-States* related to the selection or non-selection of a bargaining agent. The instant case, on the other hand, concerns activity for the purpose of economic advantage. Consistent with the rational of *Mid-States*, we feel that the interests of contractual stability sufficiently outweighs considerations of individual rights in this case so as to make appropriate, where applicable, the enforcement of the contractual prohibition against solicitation. (Emphasis added.) 405 F. 2d 1, 5.

It should be noted that this decision of the Fifth Circuit is in complete accord with the holding of the Sixth Circuit in the instant case. For in the case now at bar, the literature to be distributed did not deal with the selection or rejection of a bargaining representative as was the situation in *Mid-States*, but was a union leaflet. (Petition at page 4) Thus, it would fall within the Fifth Circuit's definition of activity for the purpose of economic advantage. The Fifth Circuit's decision in *Mason & Hanger* is just as *contra* to the Board's holding in the instant case as is the decision of the Sixth Circuit.

Because there is a lack of sufficient conflict among the circuits and with the decision in the instant case as to the ability of a company and union to contractually negotiate the right of employees to distribute literature, a grant of certiorari is not warranted by this Court; in addition, the Sixth Circuit specifically limited its finding to the facts presented and thereby implied that under different circum-

stances it may well find that a collective bargaining representative did not have authority to waive on-premises distribution rights of the employees it represents. As such it cannot support the broad question the Board has presented to the Court for consideration and is not the proper vehicle for the review sought by the Petitioner.

## 2. THE RIGHT OF THE UNION AND THE EMPLOYEES TO DISTRIBUTE LITERATURE IS NOT SO FUNDAMENTAL THAT IT CANNOT BE NEGOTIATED.

The Petitioner argues that the court below, in not recognizing the fundamental freedom of the individual to distribute literature impermissibly intruded upon the Board's function of striking a balance among "conflicting legitimate interests" which will "effectuate national labor policy". *National Labor Relations Board v. Truck Drivers Union*, 353 U.S. 87, 96 (1957). However, what are also involved in this case are the principles of the collective bargaining process and freedom of contract as well as the objectives of industrial stability and peace central to and underlying the National Labor Relations Act.

There is no freedom more fundamental to effectuating the national labor policy than the freedom between a company and the bargaining representative of its employees to contract. While Petitioner recognizes that the bargaining representative of employers and employees may waive certain of the employees' statutory rights such as the right to strike or the right to bargain about subjects within the area of mandatory bargaining (Petition at page 9), it attempts to distinguish these rights from employee distribution and solicitation rights on the basis that "the right to choose or change a bargaining representative is not

dependent upon collective action for its effectiveness, but can be exercised by each employee individually." (Petition at page 10)

Such contentions completely ignore the Act and the procedures established by the Board to effectuate it. Under Board policy and procedure stated above, in order for employees to choose *or* change a bargaining representative, they must act in concert with one another; a certain percentage of the employees in the appropriate unit to be represented must petition for representation and if an election is held by the National Labor Relations Board, a majority of those employees voting must vote for representation. Clearly, this is not the act of a single individual, but its effectiveness is totally dependent upon collective action.

It is well-settled that a union acting as the selected representative of an employer's employees represents and acts as the agent for *all* employees composing the appropriate bargaining unit. This principle holds true even though certain of those employees voted against representation by the particular union involved, and even though a majority of them may disagree with and object to certain principles governing their working conditions agreed upon by the union and the employer. The basic premise that an incumbent union represents all employees in the bargaining unit equally is clearly set forth in *J. I. Case Company v. National Labor Relations Board,* 321 U.S. 332, 339 (1944), where the United States Supreme Court stated: "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules . . ."

But Petitioner attempts further to distinguish the right

of a bargaining representative to waive certain employees statutory rights from its right to waive an employees' solicitation and distribution rights by stating that the right to choose or change a bargaining representative is a fundamental freedom which the individual possessed "prior to the selection of a representative." (Petition at page 10) However, Section 7 of the Act specifically gives employees the right to act in concert with one another for mutual aid and protection or for the purpose of collective bargaining about wages, hours, and working conditions, even without a duly authorized bargaining representative. Thus, the right to strike and the other rights which Petitioner admits may be waived by a bargaining representative of employees are likewise possessed by employees prior to the selection of a representative, and even in the absence of a representative, just as much as the employees' right to choose or change a bargaining representative. In short, the right of an employee to distribute literature is no more fundamental under the facts and circumstances of this case as is the employees' right to strike or act in concert with other employees under Section 7 of the Act.[7]

As the Supreme Court stated in *Republic Aviation Corporation v. National Labor Relations Board* and its companion case decided in the same opinion, *National Labor Relations Board v. LeTourneau Company of Georgia*, 324 U.S. 793 (1945), the rights to self organization assured to employees and the equally undisputed right of

[7] It is interesting to note that until this decision the Board under its *Gale Products* rationale did not believe that the right to distribute or solicit was so fundamental that it could not be waived at least as to Section 7 rights and organizing activities of the waiving union and the employees supporting it. This was strikingly demonstrated by the Board's inaction in the *United Steelworkers* case discussed at footnote 5, *supra.*

employers in their property rights are not unlimited in the sense that they can be exercised "without regard to any duty which the existence of rights in others may place upon the employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society." 324 U.S. 793, 798.

Much of the Board's argument that the right to distribute literature is a fundamental one is based upon its assertion that the plant is the "place uniquely appropriate" for employees to obtain information from their fellow employees. (Petition at page 8, citing *Republic Aviation, supra.*) However, as the Board itself has recognized, effective distribution of literature depends only upon receipt of the material being distributed, and not to any extent upon the location at which it is received.

> The distinguishing characteristics of literature as contrasted with oral solicitation—and a distinction too often overlooked—is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. *Hence the purpose is satisfied so long as it is received.* (Emphasis added.) (Footnote omitted) *Stoddard-Quirk Manufacturing Company,* 138 NLRB 615, 620 (1962).

An analysis or consideration of whether or not effective alternate means of communication exist is necessary before any finding should be made that the right to distribute literature cannot be waived. As the Supreme Court stated in *National Labor Relations Board v. United Steelworkers of America (Nutone),* 357 U.S. 357 (1958), when discussing the considerations which must enter into the

balancing process by which the validity of a no-solicitation /distribution rule is determined:

> No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their messages to the employees. Just as that is a *vital consideration* in determining the validity of a no-solicitation rule, (Citations omitted) it is highly relevant in determining whether a valid rule has been fairly applied. Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command the labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. (Citations omitted.) *No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor management relations.* If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of the no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of this anti-union views, there is no basis for invalidating these 'otherwise valid' rules. *The Board, in determining whether or not the enforcement of such a rule and the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communication on the right to organize.* When this important

> issue is not even raised before the Board and no evidence bearing on it is adduced, the concrete basis for appraising the significance of the employer's conduct is wanting. (Emphasis added.) 357 U.S. at 363-364.

The Company respectfully submits that in accordance with the guidelines set forth by the Supreme Court as cited above Petitioner should have at a very minimum examined the availability and effectiveness of alternate means of communication before completely depriving the Company and the Union of their freedom to contract and injecting itself directly into the collective bargaining process. Certainly, it is most difficult to accept the Board's bare, unsupported assertions that the plant is a place so uniquely appropriate for employees to obtain information or that on-premises distribution rights are so fundamental and imperative to employees as to nullify an agreement between the Company and the Union when the Board has not in any way demonstrated that the agreement cannot be given full effect with but slight, if any, impact on or impairment of employees' Section 7 rights.

The Board has completely failed to demonstrate any significant interference with employees' Section 7 rights which would in any way justify its interference with the agreement of the parties. In fact, the undisputed evidence presented to the trial examiner showed that alternate means of communication were readily available, were used, and were completely effective. Rather, what the Board has done has been to apply a "mechanical answer" to a technical question involving the balancing of employer and employee interests involved. Because of the Board's failure to consider the impact and effect of the

waiver in conjunction with the success of other methods of distribution used, the Court is placed in the position of not being able under the facts and circumstances of this case to decide the question presented by Petitioner. Thus, the Board has not established by its own review the necessary foundation to merit the granting of this Petition.

## CONCLUSION

For the reasons set forth above, Respondent respectfully submits that this case does not merit the Court's consideration and that the Petition for a writ of certiorari should be denied.

Respectfully submitted this 1st day of September, 1973.

GEORGE K. MCPHERSON, JR.
DANIEL M. SHEA
Attorneys for Respondent,
The Magnavox Company
of Tennessee

1400 Fulton National Bank Building
Atlanta, Georgia 30303
404/521-3800

SUPREME COURT, U. S.

SEP 5 1973

MICHAEL RODAK, JR., C

No. 72-1637

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

## MEMORANDUM OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, IN SUPPORT OF PETITION

---

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036

*Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Respondent*

PEERS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-1637

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## MEMORANDUM OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, IN SUPPORT OF PETITION

---

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, joins petitioner in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 8, 1973.

## QUESTION PRESENTED

Whether a collective bargaining representative may lawfully waive the right guaranteed to employees by Section 7 of the National Labor Relations Act to distribute union literature during nonworking time in nonworking areas of the plant.

## STATEMENT

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called the Union, was a party to the proceedings in the Court of Appeals in which the judgment here sought to be reviewed was entered (Pet. Apps. A and B, pp. 13, 16, of the Petition herein). Accordingly, pursuant to Rule 21(4) of this Court the Union is a respondent in this Court although not named as such by the petitioner in its petition for a writ of certiorari.

The Union, not having filed any petition for a writ of certiorari, is, of course, here bound by the affirmance by the court below of the finding of the Board that the Union had agreed by its collective bargaining contract with the Company to waive the rights of employees to distribute literature in nonworking areas of the plant on nonworking time. However, in appraising the kind of waiver of employee rights in which the Union allegedly engaged, it should be noted that neither the Board nor the court below found any language in the collective bargaining contract by which the Union expressly waived those rights. Rather the waiver is created out of a two-step inference. The reasoning utilized by the Board and the court below to find a waiver is as follows:

The collective bargaining agreement contains an express provision granting to the Company the right to

make rules and regulations, which reads as follows (Pet. App. C, p. 35, fn. 3).

> "The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement."

The Company had no written rule barring distribution on company property. The only set of written rules introduced in evidence at the hearing before the Trial Examiner appeared in an Employee Relations Handbook distributed prior to the Union's certification in 1954 or 1955 (Pet. App. C, p. 32). This set of rules contained no mention of distribution, although Rule 6 prohibited "Solicitation of any kind on Company property during working hours." The Trial Examiner found this rule was not involved in this case (Pet. App. C, p. 35, fn. 3). The same handbook, in another portion, not identified as plant rules, contained the statement, "You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property" (Pet. App. C, p. 32). It is this statement in the old employee handbook which did not appear in the list of plant rules which is contained in the same handbook, which was elevated by the Trial Examiner and the Board to the status of a rule within the meaning of the collective bargaining contract use of the word rule and by implied agreement thereto, the Union was found to have waived the right of the employees to distribute union literature in nonwork areas of the plant on nonworking time (Pet. App. C, pp. 32-33, 39).

The Union had succeeded in 1954 or 1955 in securing certification without distributing on Company property and not until 1970 did the Union have occasion to wish to make a distribution on Company property (Pet. App. C, p. 38). When the Company refused the Union promptly filed charges with the National Labor Relations Board and then discovered that it had waived this right, albeit, in the Board's view (Pet. App. C, pp. 18-25), an illegal waiver. The Board's order invalidated the waiver to the extent that the waiver permitted the employer to prohibit employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining or other matters related to the exercise by employees of their Section 7 rights (Pet. App. C, p. 25).

The Court of Appeals, however, held the waiver valid and set aside the Board's order (Pet. App. A, pp. 13-17).

## REASONS FOR GRANTING THE WRIT

1. The importance of the question presented deserves resolution by this Court of the conflict which has arisen among the circuits as described in the petition for a writ of certiorari, pp. 6-8. The exercise by workers of their rights of free speech and free press with respect to their organization and improvement of their conditions of employment has been described by this Court as "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill*

v. *Alabama,* 310 U.S. 88, 102 (1940), quoted with approval in *Thomas* v. *Collins,* 323 U.S. 516, 532 (1945).

The protection accorded by the National Labor Relations Act to employee freedom to solicit and distribute union literature is similar to the constitutional protection accorded free speech and free press in that both are "fashioned to secure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957), quoted *New York Times* v. *Sullivan,* 376 U.S. 254, 269 (1964). The nonworking area of the plant during nonworking time is the "place uniquely appropriate" for the exercise of this right. *Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 783, 801, n. 6 (1945).

Law review commentators are generally agreed that the right to solicit memberships and distribute union literature "are too closely related to the Act's essence, the spread of collective bargaining, to permit a legally effective waiver." William B. Gould, The Question of Union Activity on Company Property, 18 Vanderbilt Law Rev. 78,145 (December 1964). Compare William B. Gould, Union Organizational Rights and the Concept of 'Quasi-Public' Property, 49 Minn. L. Rev. 505, 513 (January 1965); Labor Law—Collective Bargaining—Employer May Not Enforce Collective Bargaining Provision Embodying Union Waiver of Employee's Right to Solicit Against That Union, 22 Vanderbilt Law Rev. 664 (April 1969); Labor Law— Solicitation and Distribution—Collective Bargaining Proviso Prohibiting Employee Solicitation and Distribution on Company Premises During Non-Working Time and in Non-Working Areas Constitutes a Violation of Section 8(a)(1), 14 Villanova Law Rev. 552, 557

(Spring 1969). In *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 237, fn. 14 (1963) this Court stated that it would not "honor a private settlement which purported to deny to employees the rights guaranteed them by the Act."

The exigencies of modern living have created a situation today in which "Never before have so many Americans had so little time to call their own." Sebastian de Grazia, Of Time, Work & Leisure (20th Century Fund, 1962), p. 70. "The rule of thumb reckons that men spend 10 to 20 percent of their working life going back and forth between home and work." *Ibid*, pp. 72-73." * * * the average American male who works full time—that is, at least 35 hours a week * * * works nearly 48 hours a week." *Ibid*, p. 70. Under these circumstances the ban on distribution of literature in nonworking areas of the plant on nonworking time creates more of an impediment to free communication today than in the past.

2. This Court's decision in *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 293 (1945), has been cited in subsequent opinions as holding that an employer no-distribution rule "has no inferable legitimate business purpose," *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 35 (1967), Mr. Justice Harlan, dissenting; "no significant employer justification," *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 339 (1965), Mr. Justice Goldberg, concurring. Cf. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 268-269 (1965); *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 680 (1961). The Company here cannot be concerned about littering because it regularly distributes a company newspaper to employees in the plant (Pet.

App. C, p. 37). On the other hand, the right to distribute literature, despite its importance to employees, is not one for which a newly certified union can be expected to strike, nor one over which a union can realistically be expected to strike in successive contract negotiations once the right has been waived. See William B. Gould, The Question of Union Activity on Company Property, 18 Vanderbilt Law Rev. 78, 143-144 (December 1964).

The respective considerations applicable to the issue realistically appraised, demonstrate that the question presented merits resolution by this Court.

Respectfully submitted,

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036

*Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Respondent*

September 4, 1973

LIBRARY
SUPREME COURT, U. S.

APPENDIX

Supreme Court, U. S.
FILED
NOV 23 1973
MICHAEL RODAK, JR., CLE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1637

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

—v.—

THE MAGNAVOX COMPANY OF TENNESSEE, *et al*
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 6, 1973
CERTIORARI GRANTED OCTOBER 9, 1973

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 72-1637**

---

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

—v.—

THE MAGNAVOX COMPANY OF TENNESSEE, *et al*
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## INDEX


| | Page |
|---|---|
| Relevant Docket Entries | 1 |
| Excerpts from Proceedings before the National Labor Relations Board in Case No. 10-CA-8555 | 2 |
| Witnesses: | |
| Bryan D. Sites | |
| Direct | 10 |
| Cross | 36 |
| Redirect | 46 |
| Re-Cross | 48 |
| John R. Sullivan | |
| Direct | 50 |
| Clifford Hendry | |
| Direct | 54 |
| Cross | 58 |
| Redirect | 65 |
| Direct | 69 |

Page

Excerpts from Proceedings before the National Labor Relations Board in Case No. 10-CA-8555—Continued

Bobby Kimery
Direct ____ 70
Cross ____ 75
Redirect ____ 84
Recross ____ 85

Charlotte Sexton
Direct ____ 86
Cross ____ 89
Redirect ____ 90

Charles Price
Direct ____ 90
Cross ____ 91

Earl King
Direct ____ 92
Cross ____ 94
Redirect ____ 96
Recross ____ 96

James J. Kelley
Direct ____ 98
Cross ____ 103

John R. Sullivan (Recalled)
Direct ____ 104
Cross ____ 105

GENERAL COUNSEL'S EXHIBITS:

No. 1-A through 1-H ____ 106
No. 2 ____ 121
No. 3 ____ 122
No. 4 ____ 124
No. 5 Cover page and Article XII, Paragraphs 1 and 3 on pages 58-59 ____ 125
No. 6 ____ 127
No. 7 ____ 128
No. 8 ____ 129

Page

Excerpts from Proceedings before the National Labor Relations Board in Case No. 10-CA-8555—Continued

RESPONDENT'S EXHIBITS:

No. 1 ____ 130
No. 2 ____ 131
No. 3 ____ 132
No. 4 ____ 133
No. 5 ____ 134
No. 6 Cover page; Article I, pp. 3-4; and Article XII, Paragraphs 1 and 3 on pp. 33-34 ____ 135
No. 11 ____ 136
No. 14 ____ 137
No. 15 ____ 138

General Counsel's motion to correct record ____ 140

Company's motion to correct record ____ 141

Unions' Exceptions to Trial Examiner's Decision ____ 142

Company's Cross Exceptions to certain portions of Trial Examiner's Decision ____ 144

Board's order correcting Decision and Order ____ 146

Order of the Supreme Court granting the Board's petition for Certiorari ____ 147

(The Board's decision and order and the opinion and judgment of the Court of Appeals are not reprinted in this appendix since they are already printed as an appendix to the petition)

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

### CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| | |
|---|---|
| 8.27.70 | Charge filed |
| 11.16.70 | Regional Director's complaint and notice of hearing, issued |
| 11.24.70 | Company's answer to complaint, dated |
| 1. 6.71 | Acting Regional Director's order rescheduling hearing, dated |
| 2. 9.71 | Hearing opened |
| 2.10.71 | Hearing closed |
| 3. 9.71 | General Counsel's motion to correct, dated |
| 3.11.71 | Company's motion to correct, dated |
| 4.28.71 | Trial Examiner's decision, issued |
| 6. 1.71 | Union's exceptions to Trial Examiner's decision, received |
| 6.22.71 | Company's exceptions to Trial Examiner's decision, received |
| 1.31.72 | Decision and Order issued by the National Labor Relations Board |
| 2. 9.72 | Board's Order correcting its decision and order, dated |
| 10. 9.73 | Order of Supreme Court granting Petition for certiorari, dated |

* * * *

Case No. 10-CA-8555

IN THE MATTER OF:

THE MAGNAVOX COMPANY OF TENNESSEE
*Respondent*

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC AND ITS LOCAL 796
*Charging Party*

* * * *

BEFORE:

HONORABLE ABRAHAM H. MALLER, Federal Trial Examiner.

APPEARANCES:

ALAN L. ROLNICK, ESQ., 730 Peachtree Street, N.E., Atlanta, Georgia 30308, appearing as Counsel for the General Counsel.

RONALD H. JANETZKE, ESQ., District 7, 3461 Office Park Drive, Kettering, Ohio 45439, appearing on behalf of the Charging Party.

RICHARDS FISHER, International Representative, International Union of Electrical, Radio and Machine Workers, Route 1, Box 163, Afton, Tennessee 37616, appearing on behalf of the Charging Party.

GEORGE K. McPHERSON, JR., ESQ., Smith, Currie & Hancock, 1405 Fulton National Bank Building, Atlanta, Georgia 30303, appearing on behalf of the Respondent.

## EXCERPTS FROM PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD

### IN CASE NO. 10-CA-8555

* * * *

[5] TRIAL EXAMINER: Will General Counsel representing the formal papers come forth?

MR. ROLNICK: At this time, I offer the formal papers. They have been marked for identification as General Counsel's Exhibit 1-A thru 1-H, Exhibit 1-H being an Index and Description of the Formal Documents.

(The documents above referred to were marked General Counsel's Exhibit Nos. 1-A thru 1-H for identification.)

MR. ROLNICK: They have been shown to all parties.

TRIAL EXAMINER: Any objections?

MR. McPHERSON: No objection.

TRIAL EXAMINER: Very well, being no objections then, [6] General Counsel's Exhibits Nos. 1-A thru 1-H is received in evidence.

(The documents above referred to, heretofore marked General Counsel's Exhibits Nos. 1-A thru 1-H, were received in evidence.)

* * * *

[7] MR. ROLNICK: I propose the following stipulations and I will take them one at a time. First, let's have this marked for Identification, please.

TRIAL EXAMINER: Very well.

(The document above referred to was marked General Counsel's Exhibit No. 2.)

MR. ROLNICK: I have marked for identification, General Counsel's Exhibit No. 2 which is a copy of a letter dated June 25, 1970 from Mr. Ronald H. Janetzke, General Counsel to Manager, Industrial Relations, The Magnavox Company in Greeneville. I offer General Counsel's Exhibit No. 2.

TRIAL EXAMINER: Very well, being no objections, General Counsel's Exhibit No. 2—

MR. McPHERSON: May I state my position to that, please?

TRIAL EXAMINER: I assumed this was by stipulation.

MR. McPHERSON: No, the next three documents—I will stipulate that it was sent. However, I will not stipulate concerning the truth of the matter contained therein in any way, shape or form.

TRIAL EXAMINER: Very well, with that understanding, General Counsel's Exhibit No. 2 is received in evidence at this time.

[8] (The document above referred to, heretofore marked General Counsel's Exhibit No 2, was received in evidence.)

MR. ROLNICK: I would like to have this next document marked as Exhibit No. 3.

TRIAL EXAMINER: Okay.

(The document above referred to was marked for identification as General Counsel's Exhibit No. 3.)

MR. ROLNICK: With regard to General Counsel's Exhibit No. 3, it is a two page letter dated July 16, 1970 from Mr. George K. McPherson, Jr. to Mr. Ronald H. Janetzke, General Counsel. I offer General Counsel's Exhibit No. 3.

TRIAL EXAMINER: Any objections?

MR. McPHERSON: I would stipulate to that on the same basis as I did to General Counsel's Exhibit No. 2.

MR. ROLNICK: With regard to Exhibit No. 3, this is a letter sent by Counsel and I think the matter contained therein is properly before the Trial Examiner and if Mr. McPherson does not want to stipulate to it, it is a letter that he sent, is he denying this?

MR. McPHERSON: I am saying that I will stipulate that I sent it to Mr. Janetzke in reply to his letter. However, I will not stipulate as to the—that that establishes any facts concerning the trial of this case. That is a statement in position only.

• • • •

[9] TRIAL EXAMINER: Well, I will receive General Counsel's Exhibit No. 3, and if there are any infirmities in it, you will have to demonstrate that to me. General Counsel's Exhibit No. 3 is received in evidence.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 3, was received in evidence.)

MR. ROLNICK: I would like to have another letter I have marked as General Counsel's Exhibit No. 4 for identification.

[10] TRIAL EXAMINER: Okay.

(The document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

MR. ROLNICK: I now offer General Counsel's Exhibit No. 4, which is a copy of a letter dated August 24, 1970 from Mr. Janetzke to Mr. McPherson.

TRIAL EXAMINER: Any objections?

MR. McPHERSON: I will stipulate that the letter was sent, however, I would not stipulate to—that it proves the truth of the matter.

TRIAL EXAMINER: Very well.

MR. ROLNICK: It was received, is that correct?

MR. McPHERSON: Pardon?

MR. ROLNICK: It was received, is that correct?

MR. McPHERSON: That's correct.

TRIAL EXAMINER: General Counsel's Exhibit No. 4 is received in evidence.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 4, was received in evidence.)

MR. ROLNICK: I would like to have marked for identification, this booklet, as General Counsel's Exhibit No. 5.

(The document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

MR. ROLNICK: I will now offer General Counsel's Exhibit [11] No. 5 which is a Collective Bargaining

Agreement entitled, "Agreement between Magnavox Company Of Tennessee, Greeneville, Tennessee and Local 796 of the International Union of Electrical Radio and Machine Workers, IUE-AFL-CIO-CLC dated July 1, 1968.

TRIAL EXAMINER: Any objection, Mr. McPherson?

MR. ROLNICK: I think it is part of the—

MR. McPHERSON: No objection.

MR. ROLNICK: I think the stipulation would be in order. This is the Contract Agreement between the Charging Party and the Respondent.

TRIAL EXAMINER: Do you so stipulate, Mr. McPherson?

MR. McPHERSON: We so stipulate.

TRIAL EXAMINER: General Counsel's Exhibit No. 5 is received.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 5, was received in evidence.)

MR. JANETZKE: One thing, the Contract between the International and the Local and the Company, rather than just between the Local and the Company as—

MR. ROLNICK: For identification purposes, I read what was on the outside cover of the Contract and the document will show the matters contained therein.

TRIAL EXAMINER: The document will speak for itself, yes.

[12] MR. ROLNICK: I would like to have marked General Counsel's Exhibit No. 6 for identification.

TRIAL EXAMINER: Okay.

(The document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

MR. ROLNICK: I offer as General Counsel's Exhibit No. 6, a copy of "Plant Rules" which were and are in effect, during material periods herein.

TRIAL EXAMINER: Any objection, Mr. McPherson?

MR. McPHERSON: No objection.

TRIAL EXAMINER: General Counsel's Exhibit No. 6 is received in evidence.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 6, was received in evidence.)

MR. ROLNICK: I would like to have marked for identification, General Counsel's Exhibit No. 7.

TRIAL EXAMINER: Okay.

(The document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

MR. ROLNICK: I now offer General Counsel's Exhibit No. 7, a diagram purporting to show the area around and a portion of, the inside portion of Plant No. 3. This is a rough diagram and I think to—I think there may be certain slight [13] differences as far as scale, but it is basically correct.

MR. McPHERSON: No objection.

MR. ROLNICK: Excuse me, it shows on it such matters as the area of the time clocks and the areas of the parking lot entrances which the employees use.

MR. McPHERSON: Now, this is No. 7?

MR. ROLNICK: Yes, No. 7.

MR. McPHERSON: No. 7 you say shows the time clocks, this is the outside one, is it not? Mr. Trial Examiner, we would stipulate that this is an extremely rough approximation of The Magnavox Company Of Tennessee's facility No. 3.

MR. ROLNICK: That is correct.

MR. McPHERSON: But, beyond that, we would not be able to stipulate as to the small rectangles and the arrows shown on the diagram and there are several ambiguities on the diagram that I think should be further explained and what it is. But it is a rough approximation of the facility.

TRIAL EXAMINER: With that stipulation, the document will be received in evidence.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 7, was received in evidence.)

TRIAL EXAMINER: If there is any correction or anything you want to make from it, you will have the opportunity of doing so, but the burden will be on you, of course, Mr. McPherson.

[14] MR. ROLNICK: I would like to have this diagram marked for identification, General Counsel's Exhibit No. 8.

TRIAL EXAMINER: Okay.

(The document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

MR. ROLNICK: I now offer as General Counsel's Exhibit No. 8 for introduction into evidence, a rough diagram of the inside of Plant No. 3, once again, showing such areas as the time clocks, working areas and so forth.

MR. McPHERSON: Once again I would agree that it is a rough approximation of the inside of Plant No. 3's facilities, with apparently no major discrepancies.

TRIAL EXAMINER: Very well then, General Counsel's Exhibit No. 8 is received in evidence, with that understanding.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 8, was received in evidence.)

MR. ROLNICK: I propose the following stipulation of fact: That the Union has been a collective bargaining representative of the employees at the Magnavox Plant at Greeneville, Tennessee for the past sixteen years. On May 21, 1970, the Union requested permission from the Manager of Industrial Relations to distribute literature at the time clocks. On May 22, the employer denied permission to that.

[15] TRIAL EXAMINER: Do you so stipulate, Mr. McPherson?

MR. McPHERSON: We would so stipulate.

MR. JANETZKE: The Charging Party cannot enter into that stipulation. I would propose this stipulation, that on May 21, 1970, the I-U-E and Its Local 796 re-

quested permission to distribute literature on Company property in the time clock area on May 22, 1970 the Employer gave a denial saying positively or not saying positively that the request was denied, that the request was renewed by the Union, the International and the Local on June 11, 1970 and on June 12, 1970 the positive denial or refusal was given. Thereafter, the request was given on December 3 and again on December 3, the request was denied.

TRIAL EXAMINER: Mr. Rolnick, do you agree with Mr. Janetzke's stipulation proposed in substitution of your own?

MR. ROLNICK: Yes.

MR. McPHERSON: The Respondent would not agree to that.

TRIAL EXAMINER: Very well then, the matter is not stipulated.

MR. ROLNICK: Then perhaps Mr. McPherson could propose a stipulation that would be acceptable.

MR. McPHERSON: We would not propose a stipulation at all. May we go off the record?

TRIAL EXAMINER: Yes, off the record.

(Discussion off the record.)

[16] TRIAL EXAMINER: Back on the record.

MR. ROLNICK: I propose the following stipulation: That on May 21, 1970 the Union requested permission from the Manager of Industrial Relations to distribute literature at the time clock and at a later date permission was denied.

TRIAL EXAMINER: Will you gentlemen so stipulate?

MR. McPHERSON: We so stipulate.

MR. JANETZKE: We so stipulate.

TRIAL EXAMINER: Very well, that stipulation is received. All right, anything further?

MR. ROLNICK: That concludes the stipulations as to Exhibits and facts and the General Counsel rests.

TRIAL EXAMINER: Does the Charging Party have any evidence to offer?

MR. JANETZKE: The Charging Party has none at this time.

TRIAL EXAMINER: Mr. McPherson, do you have a witness you want to call?

MR. McPHERSON: The Respondent will call as it's first witness, Mr. Bryan Sites.

Whereupon,

BYRAN D. SITES

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated, please.

[17] DIRECT EXAMINATION

Q (By Mr. McPherson) State your name, please?

A Byran D. Sites.

TRIAL EXAMINER: How do you spell your last name?

THE WITNESS: (Spelling) S-I-T-E-S.

TRIAL EXAMINER: Thank you.

Q (By Mr. McPherson) What is your occupation, Mr. Sites?

A Director of Industrial Relations for The Magnavox Company of Tennessee.

Q How long have you held that position?

A Seventeen years.

Q And, what function do you perform in your capacity as Director of Industrial Relations concerning Contract Negotiations with Unions at the facilities under your jurisdiction?

A Chief Company Negotiator for Labor Contracts and for the Magnavox Company of Tennessee, all it's facilities.

Q Would you name what those facilities are?

A I meant for all Organized Facilities, of course. We have facilities in Greeneville, Tennessee; Johnson City, Tennessee; Morristown, Tennessee; Jefferson City,

Tennessee; Ardon, North Carolina; Andrews, North Carolina; Flora, Mississippi—

TRIAL EXAMINER: Excuse me one moment. In that last stipulation which was offered as part of General Counsel's [18] case, as originally stated the stipulation included a statement that the Union had been the Collective Representative for the employees in this Plant for sixteen years, is that included in the restatement of the stipulation?

MR. ROLNICK: I think it should be.

MR. JANETZKE: No objection.

MR. McPHERSON: It should be stipulated that have represented these employees at the Greeneville facility.

TRIAL EXAMINER: The past sixteen years?

MR. McPHERSON: The past sixteen years, would that not be correct, Mr. Sites?

THE WITNESS: Yes, that is correct.

TRIAL EXAMINER: They have been the Collective Bargaining representative for those employees?

MR. McPHERSON: Yes.

TRIAL EXAMINER: Very well, I just wanted a clearing up on that, I'm sorry for the interruption.

MR. McPHERSON: That's quite all right.

TRIAL EXAMINER: Proceed.

Q (By Mr. McPherson) Do you have a facility located at Greeneville, Tennessee?

A Yes.

Q Is that facility organized?

A Yes.

Q What is the Union that represents those employees?

[19] A It is the I.U.E.-A.F.L.-C.I.O.-C.L.C. Local 796.

Q And that Union has represented the employees that part—for the past sixteen years?

A That is correct.

Q Have you been involved in the negotiations of the Collective Bargaining Agreement involved with this facility?

A Yes.

Q Where was that first facility first located?

A I'm not sure I understand your question.

Q Well, you now have Plant No. 3 where most of the bargaining union employees are located, is that correct?

A Yes.

Q How long have they been at what we call Plant No. 3?

A Since 1963, I believe.

Q Where is Plant No. 3 located?

A Plant No. 3 is located on the Snapps Ferry Road, Northeast, the far Northeast corner of the town.

Q Does the Greeneville facility at this time have an additional building where bargaining unit employees are located?

A Yes, sir we have bargaining unit employees at Plant No. 2 which is approximately two miles Southwest of Plant No. 3, also on the Snapps Ferry Road.

Q Those are the only two locations where bargaining unit employees are at work, is that correct?

[20] A That is correct.

Q Now, when did the Union first become the representative of the employees?

A As I recall, the election was held in December of 1960—It was held in 1954, certification either the end of December or in January, possibly January of 1955.

Q Were you involved in the contract negotiations with the Union, involved in the first contract?

A Yes, I was.

Q When did that take place?

A During the early spring of 1955.

Q Now, as part of those negotiations, did the Union make various proposals to you and you made counter-proposals to them?

A Yes.

Q At the time of those negotiations, did the Company have in effect a no-distribution rule?

A Yes, sir.

Q Would you state what that rule was?

MR. JANETZKE: I have an objection on this rule.

TRIAL EXAMINER: Is a copy of the rule available?

MR. McPHERSON: I believe that it is, yes. Could we have this marked as Respondent's Exhibit No. 1?

TRIAL EXAMINER: Yes, would the Reporter so mark it so that we may discuss it if Counsel desires?

[21] (The document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Q (By Mr. McPherson) Mr. Sites, I hand you what has been marked as Respondent's Exhibit No. 1 and ask you to identify it please, tell us what it is?

A Yes, this is a Page 18 of the Employee Handbook which was in effect, first issued in 1953 and in effect at the time immediately preceding the contract, the negotiation of the first contract.

Q Was this in effect at the time of the negotiations of the first contract?

A Yes.

Q During the negotiations of that first contract?

A Yes.

Q And, does that state on page 18 what the Company rule was concerning Handbills?

A Yes.

Q Would you tell us what that was, please?

A "You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property".

Q Now, at the time that negotiations were going on, did the Company make a proposal concerning the right to issue rules and regulations?

A Yes, sir. We did and it was settled.

[22] MR. McPHERSON: We ask that this be marked Respondent's Exhibit No. 2?

TRIAL EXAMINER: Okay.

(The document above referred to was marked Respondent's Exhibit No. 2 for identification.)

MR. JANETZKE: May I request that the Charging Party be supplied a copy of these Exhibits that you have had marked?

MR. McPHERSON: Yes.

TRIAL EXAMINER: I hope that everybody has a copy.

Q (By Mr. McPherson) Would you state what that is please, what has been marked as Respondent's Exhibit No. 2?

A This is a copy of the proposal made by the Company to the Union, Article 12, Item General.

Q And does that—excuse me?

A This was the 1955 proposal for the initial contract.

Q Now, this is the first contract that's being negotiated between the parties, is that correct?

A Yes.

Q Now, on that proposal, is there a proposal concerning rules and regulations?

A Yes sir, there is.

Q Would you state what that is, please?

A The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on Plant property. These rules will not be of a discriminatory [23] nature.

Q Now, was that provision accepted by the Union as stated there?

A No, sir.

Q Would you relate to us please what transpired concerning that paragraph?

A The Union first suggested a—

MR. JANETZKE: Mr. Trial Examiner, I'm going to object to these unless we can have some dates when this occured. There is no possible way the General Counsel Union could do this unless we have some idea when this occured and who was present, the proper foundation is laid.

TRIAL EXAMINER: I think the objection is well taken.

Q (By Mr. McPherson) All right, when did these discussions occur, Mr. Sites, concerning this?

A These discussions occured during February and March of 1955 meeting between the Company negotiating team and the Union negotiating committee here in Greeneville.

Q Who was on the Company negotiating team at that time?

A Mr. George McClaren and myself.

Q Who was on the Union negotiating team?

A I would have to refer to my notes to be complete on it, but it included Estelle Hinsley—

MR. JANETZKE: I'm sorrey, I missed that.

THE WITNESS: Estelle Hinsley, Trixie Edwards, J. C. [24] Ward, Naomi Hinsley, Mr. Ed Lingo was there, the International Representative.

Q (By Mr. McPherson) Mr. Lingo was the International Representative?

A And Mr. Norcross was also an International Representative and there was a Cristopherson who participated in some of the meetings who was also an International Representative at that time.

Q Who was the chief spokesman for the Union of that negotiating committee?

A That would be hard to say because we went through about three or four different ones in the process of negotiations of that contract. At various times different ones; it seems to me that Mr. Norcross started out and a Mr. McGill I believe was the final negotiator and in between these various others.

Q Now, sir as to this Company proposal on Section 3 of Article 12, General, would you relate what transpired concerning that section?

MR. JANETZKE: I have an objection. He hasn't testified that he was present in any of these, I think it's still objectionable.

MR. McPHERSON: I think he stated that he was present.

TRIAL EXAMINER: He stated that he was present for the original or Mr. McClaren, I believe was present for the [25] Company or both he and Mr. McClaren were present, so it is not hearsay.

MR. JANETZKE: He didn't say he was present for the Union. He's making a statement—

TRIAL EXAMINER: We have a statement of who was present for the Union, the witness testified to that. Now, we realize this was several years ago, who said what for the Union, it's not easy.

THE WITNESS: It would be very difficult to remember who made the statement. I have had various notes

of what was said, but to identify them to particular individuals, I don't believe I could.

Q (By Mr. McPherson) Are you testifying as a result of your notes to refresh your recollection?

A Yes, I am.

Q Do your notes indicate as to what statements the Union made or what statements the Company made about this?

A Yes, sir. And, as a matter of fact, this sheet was one of my worksheets and I have some of my notations on it.

TRIAL EXAMINER: The "Sheet" the witness and —the sheet is Respondent's Exhibit No. 2?

THE WITNESS: That is correct.

MR. McPHERSON: May he continue, Mr. Trial Examiner?

TRIAL EXAMINER: Yes, he may continue.

THE WITNESS: In the discussion of the rules, the [26] question—the Union raised the question of, or the proposal of a negotiating of the rules and making them a part of the contract and the Company opposed this feeling it was not the best way to establish rules but rather that the Company should take this action, make the rules and the Union should have the right to protest if they felt they were discriminatory type rules. The, they suggested, then they asked if we had intentions of making additional rules beyond what were in the Employee Handbook which was in effect at that time, at which time they had a copy of it. At a subsequent meeting a few days later, we advised them we had no immediate plans for any change in the rules. However, by our proposal that we would still have the right to make the changes when circumstances dictated it. They then asked, said well, there might be rules which would be not perhaps discriminatory but unfair rules and so we in turn said that we had no objection to adding an unfair along with discriminatory, so that they also could on either basis, they could be protested by the Union if they disagreed with the rules that we put forth and on this basis, we reached an agreement approximately March 7th or 8th, I'm not sure which of those dates it happened on this particular clause.

MR. McPHERSON: We request that this be marked as Respondent's Exhibit No. 3.

TRIAL EXAMINER: Okay.

[27] (The document above referred to was marked Respondent's Exhibit No. 3 for identification.)

Q (By Mr. McPherson) Mr. Sites, I had you an instrument which has been marked as Respondent's Exhibit No. 3 and ask if you can tell me what that is?

A Yes, this was the Revision, Revised Proposal with —which we submitted on March 8, 1955 to the Union permitting—

Q And, does that have the proposal concerning the making of rules and regulations?

A Yes, sir. And, this was added in pencil in my writing. The portion that I added was "Unfair Or" which was the part they still agreed—disagreed but then my notes indicated it was agreed on.

Q Was this additional, the "Unfair Or" to the proposal, is that correct?

A That's correct.

Q Your handwritten notes indicate that that was agreed to on that day, is that correct?

A Yes, sir. And, I might say it would show that it was agreed to and submitted on March 8th to the best of my recollection, we did resolve it on the same day.

Q You stated that during the discussion concerning this, the Union specifically asked if the rules of conduct which the Company was putting into effect, were the rules of [28] conduct currently in existence instead of in the Handbook, is that correct?

A Yes, sir.

Q Now Mr. Sites, what was the duration of that first contract?

A One year. I believe it expired April 30, 1956.

Q Would you state whether or not there was a decertification election held in 1956?

A Yes, there was.

Q And, when was that election held?

MR. ROLNICK: Objection, that is irrevelant here.

TRIAL EXAMINER: Is this another election after the first one?

MR. McPHERSON: Yes, sir. The Certification.

TRIAL EXAMINER: The decertification, I will permit it, subject to objection if it's not connected up then we may make a motion to strike.

Q (By Mr. McPherson) Mr. Sites, when was that decertification Election held?

A March 21, 1956.

Q Now, as a result of the decertification situation, did you have an occasion to get a telephone call from Edward F. Lingo, International Representative for the Union?

A Yes, sir.

Q The same Mr. Lingo involved in the contract negotiations?

[29] A Yes, sir. He was the International Representative servicing the Union, the Local Union at that time, the man with whom the Company was dealing.

Q And, what was the nature of that conversation?

A He called me, I believe it was on March 15, 1956 and with a violent objection that the committee inside the Plant attempted decertification as being permitted to distribute propaganda materials inside the Plant.

Q Did he point out to you that this was against Company rules?

MR. ROLNICK: Objection, for the leading nature.

TRIAL EXAMINER: The question is leading, Counsel.

MR. McPHERSON: All right, I will rephrase it.

Q (By Mr. McPherson) What did he state concerning that situation—

MR. JANETZKE: I have an objection. There's no establishment that Mr. Lingo is an agent of the International Union of Electrical and Machine Workers, no establishment of that.

TRIAL EXAMINER: The witness had identified him as an International Representative.

MR. JANETZKE: I submit to the Trial Examiner that Mr. Lingo had never been employed by this International Union.

TRIAL EXAMINER: This is a matter for you to bring out in your rebuttal.

* * * *

[32] THE WITNESS: To clear you—up the record, I was advised by Mr. Lingo and various other people representing the I.U.E. if Mr. Lingo was employed by the C.I.O. and not by any specific International. However, he was assigned as the Acting International Representative through the period of organization and the first contract, the negotiation and administration of the first contract here at Greeneville. So, to say that he [33] was not directly an employee of the I.U.E. possibly is true technically. However, he was loaned to the I.U.E. in serving that capacity at that time.

MR. ROLNICK: I would object to the last answer and move to strike unless Mr. Sites can explain who the various other people were.

TRIAL EXAMINER: I was going to ask who identified Mr. Lingo to you as being a representative of the C.I.O. and authorized to speak for the Union?

THE WITNESS: Mr. Norcross, Mr. Chet Barker and Mr. John Sullivan.

Q (By Mr. McPherson) Who are they?

A Mr. Norcross was an International Representative who identified them, representing himself to me to be of the I.U.E. and. Mr. John Sullivan, now an employee of the Magnavox Company and formerly an official of the I.U.E.?

Q What was his position with the I.U.E.?

A Well, his final position I believe was Assistant Secretary-Treasurer and the Local Union officials advised me that he was their spokesman.

Q Who you mean by "He"?

A That Lingo was their Representative, that would have been Mr. Henry Darren who was President at that time, Estelle Hinsley to name two.

MR. McPHERSON: Mr. Trial Examiner, I think that will [34] sufficiently clarify the situation to make this testimony pertinent at this point.

TRIAL EXAMINER: I think the evidence is admissible. The General Counsel and Charging Party of course,

will have the opportunity to rebut any evidence if he so desires.

MR. McPHERSON: May we proceed, sir.

TRIAL EXAMINER: You may.

MR. JANETZKE: One other thing, we still have the question of not raising affirmative defense in the pleading.

TRIAL EXAMINER: I realize that, but the Board's pleadings are not as precise, your comment on the pleading, if you complain surprise, I will give you time to obtain such rebuttal testimony as you desire in any reasonable time.

MR. ROLNICK: Your Honor, I believe recent Board's decisions, the Respondent is required to raise an affirmative defense if time—if it has one and that the General Counsel need not claim surprise and the testimony should not be admitted.

TRIAL EXAMINER: Do you have the authority to that?

MR. ROLNICK: I would site a plea, I do not have it with me at the moment. It is a recent case.

TRIAL EXAMINER: I would be glad to see what authority you have; I would consider the matter and you may send it to me.

MR. McPHERSON: May we proceed?

[35] TRIAL EXAMINER: Please do.

Q (By Mr. McPherson) Would you state what the conversation was with Mr. Lingo?

A Mr. Lingo was claiming that contrary to our previous policies and rules, we were permitting people to pass out materials in the Plant urging the people to vote against the Union in the upcoming Decertification Election and at the same time we had renewed certain—that we had removed certain employees from the parking lot who were distributing Union material to the cars on the parking lot.

I advised him that, to my knowledge, there was no such violation of the rules within the Plant that we would not permit employees within the Plant to be distributing materials of any kind for or against the Union in the upcoming election and that I would see that everybody

was properly advised that this was not to be permitted.

Q And, did you later receive from him a letter confirming the conversation or referring to it?

A Yes, the same day I received a letter from him confirming the conversation that had taken place and restating his demand that equal treatment be given.

MR. McPHERSON: I request that this document be marked as Respondent's Exhibit No. 4.

TRIAL EXAMINER: Okay, would the Reporter so mark the document so that it may be discussed further?

[36] (The document above referred to was marked Respondent's Exhibit No. 4 for identification)

Q (By Mr. McPherson) Would you state what that is please, what has been marked as Respondent's Exhibit No. 4?

A This is a copy of the letter which I received from Mr. Lingo at the time.

Q Is that the letter you referred to as, referring to your conversation?

A Yes, this is the letter.

Q Did you reply to that letter?

A Yes, I did reply.

MR. McPHERSON: We ask that this be marked as Respondent's Exhibit No. 5?

TRIAL EXAMINER: Okay.

(The document above referred to was marked Respondent's Exhibit No. 5 for identification.)

Q (By Mr. McPherson) I hand you what has been marked as Respondent's Exhibit No. 5 and ask you to tell me what that is, please?

A It is the—

MR. JANETZKE: Mr. McPherson, I'm lost on these. What is No. 4?

MR. McPHERSON: It's a letter to Mr. Sites from Mr. Lingo.

MR. JANETZKE: What is your No. 3?

[37] MR. McPHERSON: It's the revised proposal the Respondent agreed to.

MR. JANETZKE: Thank you.

Q (By Mr. McPherson) Would you state what Respondent's Exhibit No. 5 is?

A This is a letter I sent to Mr. Lingo on March 15, 1956.

Q What does it state?

A Do you want me to read it?

Q If you would?

A "Dear Mr. Lingo—

TRIAL EXAMINER: Not necessarily read it, please.

MR. McPHERSON: The letter will speak for itself.

TRIAL EXAMINER: The letter will speak for itself, yes. That is, if you want to introduce it. Excuse me a moment, Mr. McPherson. I didn't call upon the parties to give me any statements or positions. I assume the General Counsel's position is that he stated in the Complaint. However, with regard to objection of the or the failure to allege affirmative defense, I would like to have the record reflect precisely what your position is in the trial or in this case.

MR. McPHERSON: Our position is to whether or not we have committed the Unfair Labor Practice alleged in the Complaint.

TRIAL EXAMINER: To what?

MR. McPHERSON: As to the Complaint, is that what you [38] are requesting?

TRIAL EXAMINER: What is your position?

MR. McPHERSON: We are alleging, that historically, we have had the no-solicitation rule in effect, that this rule has historically for the sixteen year period and has been known to the Union and has been accepted by the Union as a valid rule and has been followed by the Union throughout the sixteen year history and to the formulation of the collective bargaining process and has waived any right that it may have to distribute literature on Company property and that therefore, there is no violation as alleged in the Complaint.

TRIAL EXAMINER: Thank you. Any comments you want to make, General Counsel?

MR. ROLNICK: It appears to General Counsel that there is an affirmative defense being raised which is not being pleaded. I don't think the requirement is that

affirmative defense be pleaded, I'm objecting to that. I'm not claiming surprise.

TRIAL EXAMINER: You are not claiming surprise?

MR. ROLNICK: No.

TRIAL EXAMINER: Is the Charging Party claiming surprise?

MR. JANETZKE: The Charging Party isn't claiming surprise that waiver is alleged, it's the extent of the evidence that's coming on in the waiver is what the surprise appears.

TRIAL EXAMINER: Very well, you may proceed Mr. McPherson.

Q (By Mr. McPherson) You did, during that first negotiation, [39] enter into a collective agreement—collective bargaining agreement, is that correct?

A Yes, sir.

MR. McPHERSON: I ask that this be marked as Respondent's Exhibit No. 6?

TRIAL EXAMINER: Okay.

(The document above referred to was marked Respondent's Exhibit No. 6 for identification.)

Q (By Mr. McPherson) I hand you what has been marked as Respondent's Exhibit No. 6 and ask you to tell us what that is, please?

A Yes, this is the original agreement between Magnavox Company of Tennessee, Greeneville, Tennessee and Local 796 and—which is the Union.

Q Is that the first collective bargaining agreement, that of which you are speaking?

A Yes.

Q Does that collective bargaining agreeemnt contain the rules and regulations provision as shown on Respondent's Exhibit No. 3 which is the revised article which you stated was agreed to?

A Yes, sir.

Q On what page?

A Page 34, Item #3.

Q Now, during that first negotiation, was there also a [40] proposal concerning Union bulletin boards?

A Yes, sir.

Q And, would you relate to us what occurred concerning that proposal during those negotiations?

A The Company made a proposal that we provide bulletin boards for the exclusive use of the Union and there was a discussion of the Company's retaining the right to approve all such notices on or to go on the bulletin board. We added an understanding that such notices would be automatically approved unless they were of a controversial nature. This was done to meet the Union's objectives.

Furthermore, the Union asked that we label these bulletin boards and so we added each bulletin board would be labeled "Local 796"—

MR. JANETZKE: I object to this testimony, it has really no foundation. The witness is testifying to agreements made, no indication of who was there, what dates these agreements were made, there's just no foundation.

TRIAL EXAMINER: The objection is well taken. I think if you are going to go into this conversation as far as the foundation, time and place, I think the witness should indicate who said what.

MR. McPHERSON: May I ask one further question and then I would like to clarify that?

TRIAL EXAMINER: Go ahead.

[41] Q (By Mr. McPherson) Was there an agreement finally reached on the bulletin board as you stated?

A Yes, sir.

Q And, it is included in the collective bargaining agreement?

A Yes.

Q What page is that shown on?

A That is on page 33, Article 12, Section 1 on over on to page 34.

Q That is Respondent's Exhibit No. 6 that you are referring to?

A Yes.

Q Now, was the Union to certify this as a result of the election on March 21, 1956?

A No.

Q Did you enter into such contract negotiations with that Union?

A Yes.

MR. McPHERSON: I request that this be marked as Respondent's Exhibit No. 7.

TRIAL EXAMINER: Okay.

(The document above referred to was marked Respondent's Exhibit No. 7 for identification.)

Q (By Mr. McPherson) Mr. Sites, I hand you Respondent's Exhibit No. 7 and ask you to tell me what that is?

[42] A This is the agreement negotiated between the Company and Local 796 of the I.U.E. dated May 1, 1956. This is a five year agreement expiring 1961.

Q Is that the second collective bargaining agreement that the parties entered into?

A Yes, sir. This is the second one.

Q Does that collective bargaining agreement contain the same ruling and regulations in it's provision pertaining to the first agreement?

A Yes, sir.

Q Was there, during the negotiation any attempt by the Union to change that provision?

A I have no recollection that they made any attempt.

Q Does that provision also contain the bulletin board provision contained in the first agreement?

A Yes, sir it does.

* * * *

[43] Q (By Mr. McPherson) Mr. Sites, if you would please, review the first collective bargaining agreement and the second one and tell me if there were, if there are or were any changes in the rules and regulations?

A Yes, there is a change.

MR. JANETZKE: May we have an indication of what page the witness is looking at?

THE WITNESS: Page 39 of the 1956 agreement and page 34 of the 1955 agreement.

TRIAL EXAMINER: The first one the witness referred to was Respondent's Exhibit No. 7 and the second one referred to was Respondent's Exhibit No. 6.

Q (By Mr. McPherson) What is that change, sir?

A Added to that section was the "Nor will they conflict with the terms of this agreement". As I said

previously, I said to the best of my recollection and my recollection has been aided by the General Counsel.

MR. ROLNICK: Perhaps, in order to clarify the record, the witness first testified, if I am not mistaken, there was no discussion on this provision during negotiations. Perhaps his recollection is refreshed as to whether or not there was?

TRIAL EXAMINER: We'll leave that to Mr. McPherson to inquire if he wants to.

Q (By Mr. McPherson) There was a change in that provision [44] adding that portion which you just read, is that correct?

A Yes, sir.

Q Now, what was the duration of that contract that you are reading?

A Five years.

Q Five year contract, when did that expire?

A April 30, 1961.

Q Was another collective bargaining agreement entered into?

A Yes, sir.

Q Before we go into that, does the second contract, the five year contract that you now have as Respondent's Exhibit No. 7, is it containing any provision for bulletin board uses?

A Yes, it does.

Q Would you compare that to the provision in the first contract?

MR. JANETZKE: May we have an indication of where the witness is reading or going to read?

Q (By Mr. McPherson) What page, Mr. Sites are you going to read from?

A Page 33 of the 1955 agreement.

Q Which is Respondent's Exhibit No 6?

A Article 12, Section 1, Exhibit No. 7, Page 38 of the 1956 Agreement—

TRIAL EXAMINER: I believe we were given the wrong Exhibit Number, weren't we? The 1955 agreement is Respondent's [45] Exhibit No. 6 and the 1956 agreement is Respondent's Exhibit No. 7.

MR. McPHERSON: That is correct.

THE WITNESS: Yes, there was a change, the one in the 1956 agreement.

Q (By Mr. McPherson) What was that change?

A We—the number of bulletin boards was increased from, the bulletin board of each plant to three bulletin boards at each plant, from one to the, three.

Q So, I believe that you said the next contract was entered into in July 1961, is that correct?

A Yes, as I recall we had some extension of the old contract when it was over with.

MR. McPHERSON: We would like to have this instrument marked as Respondent's Exhibit No. 8.

TRIAL EXAMINER: Okay.

(The document above referred to was marked Respondent's Exhibit No. 8 for identification.)

Q (By Mr. McPherson) I hand you what has been marked Respondent's Exhibit No. 8 and ask you to tell me if that is the third collective bargaining agreement?

A Yes, it is.

Q What period of time was that in effect?

A This was for one year, terminating June 30, 1962.

Q Does that contain a provision concerning rules and [46] regulations?

A Yes, it does.

Q Would you find that for us in that agreement, please?

A That would be on page 40—page 47, Article 12, Section 8.

Q Would you compare that with the language contained in Respnodent's Exhibit No. 7?

A Yes, sir. There is no difference between them.

Q No difference in the language concerning rules and regulations?

A That is correct.

Q Does the contract also contain provisions concerning bulletin boards?

A Yes, it does.

Q Would you find that for us please and compare that with the preceding contract?

A Page 47 of Exhibit No. 8, Article 12, Section 1. Yes, sir the 1961 on the bulletin board is deleted. The bulletin boards for Plant No. 1 so that we had no or only three bulletin boards at Plant No. 2, we were no longer using Plant No. 1 manufacturing operation at that time.

Q At that time, all of the employees covered in the bargaining unit located at Plant No. 2, is that correct?

A Yes.

MR. McPHERSON: We would like to have this instrument marked as Respondent's Exhibit No. 9.

[47] TRIAL EXAMINER: Okay.

(The documents above referred to was marked Respondent's Exhibit No. 9 for identification.)

Q (By Mr. McPherson) Mr. Sites, I hand you Respondent's Exhibit No. 9 and ask you if that is the next agreement that was entered into between the parties?

A Yes. This is the next agreement.

Q And, would you please state whether or not that agreement contained a provision concerning the Company's right to make rules and regulations?

A Yes, it does.

Q State where it is, please?

A On page 49 of Exhibit No. 9, Section No. 3.

Q Would you compare that with the language in the preceding contract?

A The language is the same.

Q Now sir, does that also contain a provision for the bulletin boards?

A Yes sir, it does.

Q Would you state what that language is, please?

A On page 48, Article 12, General, Section 1 and this was changed to again to put the bulletin boards in Plant No. 1. We were again using Plant No. 1 at that time as a manufacturing facility therefore provided them with two bulletin boards. It was not to the same extent as previously allowed [48] though, with three bulletin boards. Other than that, the provision is the same.

MR. McPHERSON: We request that this instrument be marked as Respondent's Exhibit No. 10.

TRIAL EXAMINER: Okay.

(The document above referred to was marked Respondent's Exhibit No. 10 for identification.)

Q (By Mr. McPherson) Mr. Sites, I hand you Respondent's Exhibit No. 10 and I ask if that is the next collective bargaining agreement?

A Yes, this is the next agreement.

Q Does that contain a provision concerning rules and regulations?

A Yes.

Q Would you compare that to the language in the preceding agreement, please?

A Yes. Page 53, Section 3, Article 12—

MR. ROLNICK: Your Honor, the documents speak for themselves. As far as the changes go, I'm not sure if I understand the Respondent's position as far as the waiver as to whether there were discussions during negotiations or whether his position is based purely on what is written in the document. If it is, then the documents speak for themselves.

TRIAL EXAMINER: The documents obviously speak for themselves. He's not soliciting any evidence or discussion in [49] negotiations as I understand it. Am I right? Other than, well, the documents speak for themselves, but it is all right for the witness to point out where the language is so that we can read it into the record.

MR. McPHERSON: That's the sole purpose of it.

TRIAL EXAMINER: So that the Board would not have to look for all this for their ruling.

THE WITNESS: This section is the same in Exhibit No. 10 as in Exhibit No. 9.

Q (By Mr. McPherson) Does that also contain, Respondent's Exhibit No. 10, also contain language concerning bulletin boards?

A Yes, it does. Article 12, Section 1, page 53.

Q Any change in that language?

A Yes, there was a reduction from two bulletin boards to one bulletin board at Plant No. 1 and the addition of three bulletin boards in Plant No. 3. We had moved into new Plant No. 3 during this period so the provision

was made for the bulletin boards for that Plant. Other than that, the provisions are the same.

* * * *

[50] Q (By Mr. McPherson) I now hand you General Counsel's Exhibit No. 5 and ask if this is the next collective bargaining agreementt hat has taken place that followed Respondent's Exhibit No. 10?

A Yes, this is the current agreement.

[51] Q Does that contract contain a provision concerning the Company's right to make rules and regulations?

A Yes.

Q And, where does that appear?

A On Page 59, Article 12, Section 3.

Q Does it also contain a provision providing for the bulletin boards for the Union?

A Yes, sir. Article 12, Section 1, beginning on page 58.

Q Mr. Sites, throughout the period of time, in the sixteen year history of representation of the bargaining unit of the employees by the Union, has the Company had in effect a no-distribution rule shown on Respondent's Exhibit No. 1?

A Yes, sir.

Q Has there been any variation in the application and interpretation of that rule, to your knowledge?

A I think there was one variation that I recall, by special permission.

MR. JANETZKE: By what?

THE WITNESS: By special permission.

MR. ROLNICK: Your Honor, I must, once again, lodge an objection. I know this probable or properly can come up in cross examination, but I move—I'm a little confused. The question was whether the rule on Respondent's Exhibit No. 1 has been in existence sixteen years and yet there has been a stipulation as to General Counsel's Exhibit No. 6. It appears [52] there is some conflict between the two. Now, we are asked about interpretation of them. I don't see how the witness can answer the question without referring to Respondent's No. 1 and General Counsel's No. 6.

MR. McPHERSON: I think he is quite capable of remembering what Respondent's Exhibit No. 1 is when I referred to is or to it as the Handbook and he states that rule has been in effect throughout—

TRIAL EXAMINER: Beg your pardon?

MR. McPHERSON: He states here that the rule has been in effect throughout the history—

TRIAL EXAMINER: You are now referring to Respondent's Exhibit No. 1?

MR. McPHERSON: That's correct.

TRIAL EXAMINER: The one about the "Handbills", is that the one you are talking about?

MR. McPHERSON: That's correct.

TRIAL EXAMINER: Which reads "You are asked to refrain from distributing notices or handbills on Company property", this is taken from the handbook?

MR. McPHERSON: That is correct.

TRIAL EXAMINER: That's 1953?

MR. McPHERSON: That is correct.

MR. ROLNICK: My point, Your Honor, is that Respondent's Exhibit No. 1 is capable of several interpretations, one of [53] which being that it is permissive. I don't think there is or I don't see anything permissive about rule here in General Counsel's Exhibit No. 6 and I think that there is a conflict between the two.

TRIAL EXAMINER: I think that's a matter for cross examination.

Q (By Mr. McPherson) Mr. Sites, state whether or not throughout this period of time we prohibited the distribution of literature on Company property?

A Yes, we did.

Q Had there been any change in our rule in this regard throughout the sixteen year history?

A No, sir.

Q This rule was uniformly enforced, I think you said except for one situation that you recall, is that correct?

A Yes.

Q What was that one situation?

A The Union came to us requesting special permission to distribute materials—

MR. JANETZKE: Mr. Trial Examiner, I'm sorry to interrupt, but we are getting leading questions again with no foundation, leaving no foundation as to date, time and place. There's just no possibility of our—it's been gone over and over again.

MR. McPHERSON: I plan to raise this through another witness who I think would be more appropriate than through Mr. [54] Sites.

Q (By Mr. McPherson) You were not directly involved in this, were you?

A No.

Q This is the "City of Hope" situation?

A Yes.

Q That doesn't involve a distribution by the Union, is that correct?

MR. JANETZKE: I object. The witness was not involved.

TRIAL EXAMINER: The question of the witness is not the best evidence on the subject. The witness admittedly was not involved in the matter. Counsel has indicated he will attempt to prove it through another witness.

MR. ROLNICK: Your Honor, Mr. McPherson has the stipulation as to the acception on the date and the matter on which the permission was given for the "City of Hope". I will stipulate with him. I can't see a factual matter here that's not to be disputed, let's just stipulate to that.

TRIAL EXAMINER: Do you want to stipulate?

MR. McPHERSON: I don't think there would be any problem in that regard, but I can't anticipate that. I would rather prove it through my witness.

TRIAL EXAMINER: Very well. You may do so.

Q (By Mr. McPherson) With that one exception that you recall, state whether or not the rule has been uniformily [55] applied?

A Yes.

Q And, literature has been prohibited from distribution on Company property, is that correct?

A Yes.

Q Throughout the sixteen year history, has the Union ever filed a grievance alleging that that rule has been unfair?

A No, not to my knowledge.

Q Throughout the history of negotiations with the Union through these various collective bargaining agreements, has the Union ever raised, in negotiations, the question, have they ever tried to change through negotiations the Company's no-distribution rule?

A I have no recollection that they ever did.

Q And, Mr. Sites, to the best of your recollection or to the best of your knowledge, at the moment that is, is there any attempt being made to oust this Union by employees in the bargaining unit?

MR. ROLNICK: Objection, it's immaterial and irrelevant.

TRIAL EXAMINER: Sustained.

MR. McPHERSON: I disagree. I think it is material. May I be heard?

TRIAL EXAMINER: Yes, you may.

MR. McPHERSON: The Board and the Courts have ruled, General Motors and Gale Products to be precise, that on [56] situations where an organizational attempt by another Union was being made, or where certain occasions are involved, my point is, here there is no organizational effort by any other Union nor is there any effort to be decertified this Union by the employees, at least to our knowledge. Therefore, we are not involved in the normal no-solicatation, no-distribution situation that is controlled by those cases and I believe that it's pertinent to any finding made by the Board, that is to as to whether, if it should go as far as the Courts, as to organizational activity was in existence at that time.

MR. JANETZKE: It couldn't happen, possible to have a Petition pending at the present time.

TRIAL EXAMINER: Until the Charging Party and General Counsel produces evidence to the effect that there is a new decertification effort, the whole issue is moot as far as we're concerned and we had the normal situation, why—

MR. McPHERSON: The normal situation, Mr. Trial Examiner, is the organizational attempt, the normal situation is not what we have here and I think that is most pertinent to the distinctions between this case and Gale Produces and Stoddard Quirk and Babcock-Wilcox and the whole line of cases, we are not involved in that context or in that situation and therefore, it is our position that those cases do not apply.

MR. ROLNICK: Your Honor, my objection to immateriality was that this Complaint alleges that the Respondent, by [57] maintaining an enforcement of it's no-distribution rule, is attempting to take away a right of the employees which exist, which is a statutory right, and unless there has been a waiver or unless there are special circumstances proved, it violates the law, very simple. Therefore, whether or not there has been an effort to decertify this Union is immaterial to the issue framed by the General Counsel's Complaint.

MR. McPHERSON: That is not the position taken by either the Sixth Circuit Court of Appeals which has jurisdiction over this case or by the Seventh Circuit Court of Appeals, nor by the Fifth Circuit—

MR. JANETZKE: Is the Employer maintaining that there was a decertification effort, that the Union would have the right to distribute literature on Company property?

MR. McPHERSON: No, sir. We are not. We are saying that the change of circumstances which is revealed that remain to this case.

MR. JANETZKE: It doesn't make any difference whether it's a decertification case or not. The Union has a right to distribute literature, how could that possibly be the issue?

MR. McPHERSON: You're getting into an issue of Union rights as opposed to Employees rights to oust and decertify bargaining representatives, my point being that the right of the employees does not involve, is not involved in this case as opposed to the rights of the Union.

[58] MR. ROLNICK: It would be the same thing if the Union rights were the ones involved. Again, the question is immaterial. The Union has a right under the

statute unless it is resting, has waived it's right to distribute literature.

TRIAL EXAMINER: Unless the Union or General Counsel introduces evidence or produces evidence of a decertification effort or an attempt by another Union to get into the Plant, I would assume that that situation does not exist. It is not necessary for you to prove a negative. We will assume, on the basis of the existing contract, that that situation does not exist, but if you want to argue in your brief, that Stoddard case and the others mentioned are not applicable because there was a decertification petition involved there, you can offer it without proving the existence, proving that such a situation was not existing in this case.

MR. McPHERSON: Very well. I will be content with that. I would like for the record to reflect that I have attempted to show that there was no organizational activity going on at the Plant.

TRIAL EXAMINER: You are making an offer of proof? Is that what you are saying?

MR. McPHERSON: My offer of proof would be that Respondent stands ready to show that there is no organizational activity at it's facility represented by this Union, there is no organizational effort by any other Union at it's facility, [59] now apparently under way to decertify or oust this Union as a representative of the employees in the bargaining unit.

TRIAL EXAMINER: Counsels, what do you say to the offer of proof? Do you want to object to it?

MR. ROLNICK: I object to it on the immateriality of it.

TRIAL EXAMINER: I will sustain the objection and reject the offer of proof.

MR. McPHERSON: I have no further questions of this witness.

TRIAL EXAMINER: Counsel, you haven't offered your exhibits in evidence. Do you want to introduce those at this time?

MR. McPHERSON: I might as well do that now, prior to cross examination. At this time we would offer

into evidence Respondent's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

* * * *

[63] TRIAL EXAMINER: Respondent's Exhibits Nos. 1 thru 10 are received into evidence.

(The documents above referred to, heretofore marked Respondent's Exhibit Nos. 1 thru 10, were received in evidence.)

TRIAL EXAMINER: Respondent's Exhibit Nos. 2 & 3 are received without reference to the handwriting in the margins. That will be disregarded. The only handwriting that will be considered are the words "of Unfair Order," in Respondent's Exhibit No. 3, under Paragraph No. 3. All other handwriting is to be disregarded.

Now, with regard to Respondent's Exhibit Nos. 4 & 5 to which objection has been made, I receive those into evidence and of course, General Counsel and the Charging Party have a right to present evidence as to the power of authority of Mr. Lingo to represent the Union. However, I note that the Respondent's Exhibit No. 4 is on the letterhead of the Union, which creates some presumption that he was acting on behalf of the Union, which is also a subject for rebuttal. Very well, you may Cross-Examine.

[64] CROSS-EXAMINATION

Q (By Mr. Rolnick) Mr. Sites, would you please refer to Respondent's Exhibit No. 6, which I believe is the contract dated May 1, 1955? With respect to the negotiation that proceeded a signing in Respondent's Exhibit No. 6, was there any mention in those negotiations of Page No. 18 or Respondent's Exhibit No. 1, a rule in which you are asked to refrain from the distributing of notices or handbills in the parking lots among other— or on other Company property? Is there any specific mention of that clause during the negotiations?

A You are referring to which one?

Q Respondent's Exhibit No. 1?

A Not since—

Q No, referring to Respondent's Exhibit No. 1 on handbills. Was there any mention of that preceding the signing of Respondent's Exhibit No. 6?

A I have no recollection of specific mention, no.

Q Can you testify that this rule was shown to the Union referring once again to Respondent's Exhibit No. 1?

A I can only testify that the Union had these handbooks in their possession during the negotiations and had them present at the bargaining table.

Q With reference to the full booklet, Respondent's Exhibit No. 1 of which Page No. 18 is in evidence as Respondent's [[65] Exhibit No. 1, I should say, was this given to all employees?

A That was the policy, yes, sir.

Q Can you state that all employees had a copy?

A We've got several thousand employees. I don't think I can unequivocally state that every single employee had one. However, the great propounderance of employees did have one, and all employees had access to this instrument.

Q When you say "access", where was the access?

A To the street approaching their department or through their immediate supervision. All of them had copies of it.

Q An employee, if he wanted a copy of it and his immediate supervisor did not have a copy of it, would he have to go to the Personnel Office to get a copy there? Would he know to do that?

MR. McPHERSON: I object to that as conjecture, Your Honor, on what the employee would have done. He has testified as to what the Company policy was and they distributed the handbook. I believe he has testified that anything beyond that, is beyond his knowledge.

TRIAL EXAMINER: I'll sustain the objection.

Q (By Mr. Rolnick) Was there any discussion preceding the signing of Respondent's Exhibit No. 6, that Respondent's Exhibit No. 1, the provision about handbills might be unlawful?

A I'm sure there was none. I don't recall any.

[66] Q When you received the telephone call from Mr. Lingo, March 19, 1956, was there any discussion during this telephone conversation that the rule was unlawful?

A No, sir.

Q Did you prepare the letter dated March 15, 1956, which is Respondent's Exhibit No. 4?

A You say did I correct—

Q Did you receive it?

A Yes.

Q I'm sorry, did you prepare Respondent's Exhibit No. 5 is what I meant to ask?

A Yes, I did.

* * * *

[68] Q (By Mr. Rolnick) With regard to the negotiations preceding the signing of Respondent's Exhibit No. 6, was anything said during those negotiations by or about that by entering into Articie XII, Section No. 1, or Article XII, Section No. 3, the Union was waiving its right to distribute literature on Company property?

A Specifically, no.

[69] Q Am I correct, sir, that the contract does not contain any expressed provision prohibiting Union distribution on Company property?

A Specific provision, no, it is not.

Q Just to speed this up, in any negotiation, has there ever been—has it ever been expressly mentioned why the parties that by entering into Article XII, Section Nos. 1 & 3, the Union was waiving its right to distribute literature on Company property?

A No, only that the Company had the right to make rules.

Q Referring to Respondent's—The context in Respondent's Exhibit Nos. 6 thru 10, any of those contracts an expressed provision that the Union was waiving its right to distribute literature on Company property?

A No, specific statement at that time.

Q You testified that the last sixteen years the handbilling provision, Respondent's Exhibit No. 1, has been in existence, is that correct?

A Would you ask that once more?

Q Has that provision been in existence for the past sixteen years?

A To say that the provision has been in existence, is a difficult question to answer, but the rule has been in existence.

Q Has the rule been contained in the same employee handbook [70] for the past sixteen years?

A Yes, it has. However, we have not continued to distribute this handbook.

Q When did you stop distributing this employees handbook?

A About the time that the Union was certified.

Q As I understand your testimony then, since the time the Union has been certified, you have maintained an employee handbook in your Personnel Office, but you have not distributed this to your employees?

A We have maintained copies of this book. However, we have not distributed this book as a current employee handbook, no.

Q Is there another employee handbook?

A No, sir.

Q If an employee—Have you hired any employees in the last year?

A Yes, sir.

Q Are these employees made aware of the Respondent's Exhibit No. 1?

A No, sir, we have not distributed this since 1955.

Q Can I assume that the Respondent's Exhibit No. 1 has remained in dormant since 1955?

A Exhibit No. 1 handbook, yes, sir.

Q Thank you. When did you formulate—

MR. McPHERSON: I would like a classification of the [71] handbook, the rule has been going on, is that not correct?

MR. JANETZKE: I am going to object to Counsel giving the witness the answer. That's highly prejudicial.

TRIAL EXAMINER: Just a moment. I understand that the testimony of the witness, that the book has not been distributed and this book has apparently been dormant. Nothing was said about the rule.

Q (By Mr. Rolnick) In the last fifteen years of the hiring of employees, do you inform him of that rule as it is written on Respondent's Exhibit No. 1?

A No, sir.

Q Is there any effort to acquaint an employee with that rule that is contained on Respondent's Exhibit No. 1?

A No, sir.

Q When did you first draw up the plant rules listed as General Counsel's Exhibit No. 6?

A We have had rules of this nature—I guess, since 1947, not this specific list, but there have been changes from time to time when this particular list was formulated. I can't really say.

Q How long have you had rules such as contained on General Counsel's Exhibit No. 6? How long has that been in existence?

A Well, I am speaking without reference to data. The best I can remember it has been there for many years, at least fifteen years.

[72] Q Was it in existence prior to the Union certification?

A Yes, sir.

Q Did you call this rule to the Union's attention during the negotiations of the first contract?

A Not specifically, no, sir.

Q At any time during the negotiations of the contract, did you call the Union's attention to the existence of rules such as contained on General Counsel's Exhibit No. 6?

A Only in the manner that we advised the Union that we had no—No, we did not anticipate making any changes in the rules following the negotiations of the contract.

Q In other words, am I correct in assuming that during the negotiations beginning with the first contract and up to this last contract, there has been no mention by either party at any time about rules such as contained in General Counsel's Exhibit No. 6?

A I don't recall if we discussed any of the rules during negotiations other than the first negotiation, when those questions were asked.

Q Now, you say that you uniformly applied your rule concerning the distribution of literature on the Company property, is that correct?

A To the best of my knowledge, it is.

Q There may be instances where it is not applied uniformly?

A I said, to the best of my knowledge, no.

[73] Q Have you ever had instances where an employee has attempted to distribute literature on Company property?

A I'm not sure that I am the best one to answer that. I have a number of plants under my jurisdiction, and it has not come to my attention.

Q To your knowledge, has any employee ever received a warning or any discipline in the Company in his attempt to distribute literature on Company property?

A Not to my knowledge.

Q Do you have instructions to your Plant Supervisors that if they discover someone distributing literature on Company property, that they are to discipline them or write them up?

A They are advised that they are not to permit it.

Q What are they suppose to do if an employee persists in carrying out the distribution of literature on Company property?

A They are told to stop.

Q In what manner?

A I don't know. We figure that the supervision is capable of handling such problems.

Q Is this to be done physically or to be done by a discipline method of some sort?

A To my knowledge, you are talking about cases that I have never—That have never occurred. We have instructed our supervision and guard force that these things are not to be [74] permitted, and we have never had this problem to my knowledge with anybody refusing to abide by this and those instructions.

Q Is a fact then to the best of your knowledge, then the Union's request to distribute literature on Company property was the first time that anyone has sought to distribute literature on Company property?

A No, sir, it is not the first.

Q Have there been attempts to distribute literature on Company property?

A Yes, sir, there was an attempt in 1956 when it was aborted.

Q What happened on that occasion?

A On that occasion the guards directed the employees to leave the parking lot and they did. That was the objection that Mr. Lingo had.

Q Have there been other occasions?

A As I said before, I am not sure if I am the best one to answer that. But, to the best of my knowledge, I don't have specific knowledge of a specific case, of any specific cases.

Q Well, to the best of your knowledge, are you saying that the rule is uniformly applied? Are you talking about the 1956 incident with Mr. Lingo and the "City of Hope" incident, is that what you mean by uniformly applying the rule?

A It was uniformly applied in both cases, yes, with an exception being the latter.

[75] Q And to the best of your knowledge, there is or has been no need to apply the rule in other cases?

A That is not what I said. I said that I am not the best person to answer that question because of the problems, they do not normally come to my attention.

Q Specifically, do you have knowledge on whether or not the rule has ever been applied as far as the two incidents, the Lingo incident and the "City of Hope" incident?

A I have had specific requests from local merchants, local civic groups, to advertise various things within the plant, and I have always rejected these requests.

Q Have you had any requests by employees to distribute?

A Some of these requests—Some civic groups have come through employees, yes, sir.

Q Just to clarify General Counsel's Exhibit No. 6, were these rules in effect prior to the certification of the Union?

A I am sure that some of them were. To say that they all were, I couldn't say.

Q Specifically Rule No. 6, during working hours?

A If I could refer to the booklet on the table there, I could probably tell.

(The booklet was handed to the witness.)

Q You just read off here awhile ago, soliciting of any kind on Company property during working hours.

A May I confer with the other one?

[76] (The other booklet was handed to the witness.)

MR. ROLNICK: Okay, let the record show that Mr. Sites is looking at Page No. 18 of Respondent's Exhibit No. 1, with the one page, and is looking at General Counsel's Exhibit No. 6.

THE WITNESS: Yes, sir, this is the same rule and the same number that was in the booklet in effect prior to the Union certification.

Q (By Mr. Rolnick) Do I understand from your testimony that Rule No. 6 on General Counsel's Exhibit No. 6 is the same rule that entitled handbills on Respondent's Exhibit No. 1?

A No, sir. Page No. 24, No. 6 is the same one.

MR. ROLNICK: Your Honor, I would join the Charging Party in it's objection to the admissibility of just one page of Respondent's Exhibit No. 1, it would seem that at least Page No. 24 in the plant rule would be applicable.

TRIAL EXAMINER: It appears that there was more than the employees handbook than Page No. 18, which is Respondent's Exhibit No. 1.

MR. McPHERSON: I would have no objection of entering into evidence Page No. 24 of which I have here and am prepared to enter. I would like to have it marked for identification as Respondent's Exhibit No. 11.

(The document above referred to [77] was marked Respondent's Exhibit No. 11 for identification.)

TRIAL EXAMINER: Would you agree on that gentlemen? That Page No. 24 would be introduced into evidence?

MR. JANETZKE: I have no objection.

MR. ROLNICK: No objection.

TRIAL EXAMINER: Respondent's Exhibit No. 11 is Page No. 24 of the employees handbook, in which Respondent's Exhibit No. 1 is Page No. 18 of that handbook, issued in 1953. By stipulation, it is received into evidence.

(The documents above referred to, heretofore marked Respondent's Exhibit No. 11, was received in evidence.)

MR. ROLNICK: By stipulating, I want to make clear that I am not agreeing that Page No. 24 or Page No. 18 of Respondent's Exhibit No. 1 & 11, are or where in possession of employees at any time during the last sixteen year period.

TRIAL EXAMINER: There is no evidence that it was.

MR. McPHERSON: I am sorry, what was your statement, please?

MR. ROLNICK: By entering into that stipulation, I am not agreeing that the employees possessed Respondent's Exhibit No. 1 and Respondent's Exhibit No. 11 at any time during those sixteen years. Mr. Trial Examiner, I have [78] no further questions.

TRIAL EXAMINER: Does the Charging Party have any questions?

MR. JANETZKE: Yes.

Q (By Mr. Janetzke) Mr. Sites, when did you begin distributing the plant rules in the form that they now appear, which I believe is General Counsel's Exhibit No. 6?

A I believe I testified that I am not sure when this specific book of rules was first issued.

Q I am not asking you about those first book of rules, but on those forms on the separate sheets. As they now appear, they are on a separate sheet, aren't they?

A Yes.

Q When did you begin distributing in your plant, rules to employees on separate sheets like you have in your hand, which is General Counsel's Exhibit No. 6?

A Well, first of all, we don't distribute rules on separate sheets like this to employees.

Q All the rules are on one page, aren't they?

A Yes.

Q How do the employees get those rules?

A They are posted in the plant.

Q When did you begin posting them in the plant in the form that they are shown on General Counsel's Exhibit No. 6, not those particular rules, but on a piece of paper listing [79] the rules?

A At least twenty years ago.

Q Now, we go back to Respondent's Exhibit Nos. 4 & 5, and so that you will know what I am talking about, Respondent's Exhibit No. 4 is the letter which I am handing you from Mr. Lingo and your reply. Are you familiar with those two letters?

A Yes.

Q Did you consider those to be an Agreement between the I.U.E. and the Local No. 796 and the Company, concerning the literature distribution?

A I understood, yes, that we were in agreement on this.

Q You understood this to be like a settlement to the contract, is that your position?

A In that it is accepted that this is one of the rules, yes sir. The contract gives us the right to formulate the rules. I pointed out in this letter that this was a rule and that we did not permit such distribution.

Q I am not asking you that question.

MR. McPHERSON: You may answer it.

Q (By Mr. Janetzke) Did you consider it to be a supplement to the agreement?

TRIAL EXAMINER: You may answer that question.

THE WITNESS: I considered it as a rule to have the strength of the contract, yes, sir. To say supplement to, no [80] the rules are not supplements to.

Q (By Mr. Janetzke) I'm not—I'm talking about the letters, the exchange of letters. Did you consider this to be an agreement between you and the Union concerning the distribution of literature?

A To me this was a reiteration of an existing policy and existing rule, accepted by the Union, yes, sir.

Q Did you consider that to be an agreement between the Union and the Company concerning literature distribution?

MR. McPHERSON: I object, Mr. Trial Examiner. I think he has answered the question.

TRIAL EXAMINER: I think he has answered the question.

Q (By Mr. Janetzke) Now, did you say you attended every contract negotiation since 1955?

A Yes, sir.

Q You have been present in every session?

A Well, now I will have to think about that a moment. I don't remember missing any.

Q Now, is the reason that nothing can get into the plant is because the guards confiscate everything at the gate?

A Did I say that nothing gets in the plant?

Q Well, leaflets?

A If an effort is made to bring leaflets in, yes, I guess they would be confiscated at the gate.

Q And, lets say there are birthday presents for an employee, [81] would they be confiscated?

A No.

Q What does the guard pick up at the gate, just leaflets?

A There are various things that people want to bring with them that we don't permit them to bring into the plant, which they will leave at the guard gate to pick up when they leave or for somebody else to pick up when they leave.

* * * *

## REDIRECT EXAMINATION

Q (By Mr. McPherson) Mr. Sites, would you say—Would you state whether or not the rules shown as General Counsel's Exhibit No. 6 are currently posted in the Greeneville facility?

A Yes, sir, they are.

Q And have those rules—I will rephrase that. Would you say or state whether or not rules have continuously been posted throughout the sixteen years, the sixteen year history which has incorporated Plant Rule No. 6 of General Counsel's Exhibit No. 6?

[82] A Yes, sir, they have.

Q That is the "No Solicitation" rule, is that correct?

A That is correct.

Q What has been the Company's interpretation of Company Exhibit No. 6?

MR. JANETZKE: Objection.

TRIAL EXAMINER: You might restate that.

MR. McPHERSON: I think it would be better for me to rephrase that, yes.

Q (By Mr. McPherson) State whether or not, Mr. Sites, that Company Rule No. 6, shown on General Counsel's Exhibit No. 6 also applies to the "No Distribution" situation?

MR. JANETZKE: Objection. The rule speaks for itself.

MR. McPHERSON: I don't quite understand the objection. In view of the General Counsel's allogation as a complaint in alleging that that is the situation.

TRIAL EXAMINER: Overruled.

MR. ROLNICK: Your Honor, the complaint alleges that there is a "No Distribution" violation. The rule—The witness has testified as to the existence of the rule and that is being maintained and enforced in the plant at the moment. That is all that is encompassed by his complaint and it certainly is an illegal No Legal Solicitation rule on its face.

MR. McPHERSON: I would refer to the complaint, paragraph No. 6 wherein General Counsel alleges Respondent has [83] maintained and enforced in the plant the following rule, "Soliciting of any kind on Company property during working hours will not be permitted," which is Company Rule No. 6, shown in General Counsel's Exhibit No. 6. And, then in Paragraph No. 7, the General Counsel states that, "Since on or about May 21, 1970, Respondent, by maintaining and enforcing the provision set forth in Paragraph No. 6 above, has pro-

hibited its employees from distributing literature on behalf of the Union during employees' non-working time in non-working areas of Respondent's premises."

MR. ROLNICK: My point is that we have already established or stipulated that Respondent has enforced this, and this witness has testified that Paragraph No. 6 as a complaint which for some reason was denied in the Respondent's answer, is accurate. The Company has maintained and enforced then an exact rule.

TRIAL EXAMINER: I will overrule the objection. You may answer. Do you want the question read back to you?

THE WITNESS: Yes.

MR. McPHERSON: I can rephrase it rather than have it read back.

TRIAL EXAMINER: Okay.

Q (By Mr. McPherson) Would you state, Mr. Sites, whether or not Company Rules as shown in General Counsel's Exhibit No. 6, also pertains to distribution of literature?

[84] A Yes, sir, it does. We have assigned this rule to when people have requested the distribution of literature, we tell them that Rule No. 6 does not permit this.

Q When you say that people have requested permission to distribute literature, whom are you referring to?

A To my previous testimony of either outsiders or employees wishing to distribute literature, information about either business matters or civic activities that they want to advertise and sell in the plant.

* * * *

[85] RECROSS-EXAMINATION

Q (By Mr. Rolnick) Mr. Sites, to your knowledge, does the Company itself distribute literature on Company property?

A Yes, on occasion we do.

Q Has the Company—

MR. McPHERSON: I am going to object. This is going beyond the scope of Redirect.

TRIAL EXAMINER: Well, it is, but I will permit the inquiry.

Q (By Mr. Rolnick) Has the Company distributed literature to its employees on Company property since it denied the Union's request to do so on May 21, 1970?

A It is quite possible that we have on occasion. The supervision will prepare letters for example, to give to employees pointing out specific things that they expect of [86] them. We have this type of communication with them in connection with their work.

Q Did you also in June of 1970, distribute the monthly Magnavox magazine to employees on Company property?

A I believe on one occasion we did do that, yes, sir. Normally we mail it, and we did before and we have since then. But, on this occasion, this one occasion, for various reasons we didn't, or we did do that.

Q And you have also—Never mind, we will forget that.

MR. ROLNICK: I have nothing further.

MR. McPHERSON: I have no further question.

MR. JANETZKE: I have no further question.

## EXAMINATION

Q (By Trial Examiner) Mr. Sites, I would like to have you refer to the negotiations of the original Collective Bargaining Agreement. At that time, did the Union discuss generally the matter of who, or was it specific rules that they talked about?

A It was generally a matter of rules and that we had asked to withhold the rights to formulate the rules just as the contract was eventually written. And, they asked in general if we had any plans to change any of the current rules. We reviewed them and told them that we had no immediate plans but that it was very likely from time to time in the future that we would change, specific rules were [87] not discussed.

Q The Union did not object to any specific ruling?

A No, sir.

Q As to be deleted?

A Not to my recollection, no, sir.

* * * *

JOHN R. SULLIVAN

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated, please.

[88] DIRECT EXAMINATION

Q (By Mr. McPherson) State your name please.
A John R. Sullivan.
Q What is your occupation, Mr. Sullivan?
A Staff Assistant to the Director of Industrial Relations of the Magnavox Company of Greeneville, Tennessee.
Q Is the Director Mr. Byran Sites?
A Correct.
Q And you are Staff Assistant to him?
A Yes.
Q How long have you held this position?
A Since 1963.
Q What was your position prior to that?
A Assistant to the Secretary-Treasure of the International Union of Electric Workers.
TRIAL EXAMINER: I'm sorry, I didn't get that. You did what?
THE WITNESS: Assistant to the Secretary-Treasure of the United Electrical Workers.
TRIAL EXAMINER: Would you speak up please.
Q (By Mr. McPherson) How long were you employed with the International Union of Electrical, Radio and Machine Workers, is that the correct name of the Union?
A That is correct. 1951 thru 1962.
Q Where you employed with them in 1956?
[89] A Yes.
Q Specifically, I wanted to direct your attention to a decertification of election involving the International Union of Electrical, Radio, and Machine Workers here at the Greeneville, Tennessee facility for the Magnavox Company of Tennessee. Are you familiar with that situation?

A Yes, sir. I worked on it for a short period of time.

Q What was your position with the Union at that time?

A Field Representative.

Q Were you involved in that campaign and election?

A Yes.

Q Would you relate your involvement in that campaign?

A Well, we signed the election and for the last ten days or so, I was sent in the line with two or three other International Representatives.

Q Are they the fellows who had been working there for some period of time?

A Yes.

Q Who was the International Representatives who were here at the time you came?

A Mr. Lingo was the man in charge.

Q Lingo was in charge?

A Yes, sir.

MR. ROLNICK: Your Honor, I object to the International Representative of who?

[90] TRIAL EXAMINER: What?

MR. ROLNICK: Who was the International Representative for?

TRIAL EXAMINER: Identify him.

Q (By Mr. McPherson) Would you explain who Mr. Lingo was?

A Lingo was on the CIO Organizing Committee Payroll with the full reporting responsibility to the CIO Organizing Committee and to the United Auto Workers, I.U.E.

Q Was he involved in the original organizing of the Greeneville facility of the Magnavox Company?

A Yes, he had worked in this immediate area for quite a number of years. Exactly how many, I couldn't say. He worked in both organizing campaigns in this plant.

Q Was he acting in the capacity of Representative of the I.U.E. at that time?

A In both elections, yes. The plant was organized in the name of I.U.E.

Q Who was the head of the organizing team for the I.U.E.? Was he the head of that?

A Yes.

Q Now, Mr. Sullivan, did your Company have a conversation with Mr. Lingo concerning the distribution of literature on Company property?

MR. JANETZKE: I object. This witness has just testified that Mr. Lingo worked for not the I.U.E. but he was employed [91] by the CIO. I submit that it's impossible to prove say that A.B.C. is another labor organization and a person employed by a different labor organization than the CIO is certainly a different labor organization from the I.U.E.

MR. McPHERSON: Mr. Trial Examiner, I appreciate Mr. Janetzke's concern over this situation. I can understand that he is not too happy at this point in time to recognize Mr. Lingo, although they certainly seemed to be happy back in 1955 to recognize him. And, it seems quite strange that they now denounce him when in fact, he is one of the individuals who signed the original Collective Bargaining Agreement on behalf of the I.U.E.; which I think is reflected, if I am not mistaken on the first Collective Bargaining Agreement which is Company's Exhibit—Respondent's Exhibit No. 6.

MR. JANETZKE: There may be a difference between having the authority to negotiate a contract and assignment and the authority to represent a Union in other matters, such as the decertification case. There has been no direct evidence submitted that Mr. Lingo was a representative for the I.U.E. in the certification of this projection.

MR. McPHERSON: I want to explain that Mr. Sullivan is testifying to that point right now.

TRIAL EXAMINER: It appears that Mr. Lingo was one of the signers of Respondent's Exhibit No. 6 on behalf of the Union. I think there is enough prima facie evidence of the [92] witness to answer the question to put the burden on the Charging Party and General Coun-

sel of going forward with the evidence to show any lack of authority. I am going to overrule the objection.

Q (By Mr. McPherson) Mr. Sullivan, again you were with the I.U.E. at that time?

A Yes.

Q You were an International Representative, is that correct?

A Yes.

TRIAL EXAMINER: I believe you said that you were Field Representative?

THE WITNESS: Well—

TRIAL EXAMINER: Is there a difference?

THE WITNESS: No, the terms are used the same.

TRIAL EXAMINER: Very well.

Q (By Mr. McPherson) Was it your understanding that Mr. Lingo was also representing the I.U.E. in the certification?

A Yes, he was reporting to the I.U.E. Headquarters.

Q How do you know this?

A I saw the report.

Q Is this a written report that you are referring to?

A Yes. He reported jointly to us and to the CIO.

Q Was he also the individual responsible for what the Union did in the certification campaign?

A Yes, he was.

[93] Q Did he have the authority to say that this will be done and this will not be done?

A Yes, he did.

Q Did you have an occasion to have a discussion with him concerning what should be done during the campaign in regard to the distribution of literature?

A Yes, I did.

Q What was that—When was that?

A A short time before the election.

Q When was the election, Mr. Sullivan?

A I think December 20—Wait a minute, March 21, 1956, the decertification election. Arbitrations or a series of arbitrations acting by Mr. Fred Holiday, and the Union wanted an overwhelming preponderance of issues involved. And, I suggested that we reproduce all of the documents because it was so bulky that it would be

hard for him to—We would take them on to the parking lots and put them all over the cars which were in the parking lot.

Q Were you going to do this personally?

A No, sir. It was to be done by both employees and original Field Representatives that were here. Lingo didn't feel that it would be a good idea if the late comer or organizers, for lack of a better word, actively participated at the gate.

Q Now, did you discuss this with him?

[94] A Yes.

Q What was his reaction and what did he say to you?

A He said "no", that the Company had said that we could not go on Company property to distribute literature. That he had had a reasonably good working relationship with the Company at this point, and that he did not want to rock the boat, and that he wanted to abide by the Company rules.

* * * *

## CLIFFORD HENDRY

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated, please.

## DIRECT EXAMINATION

[95] Q (By Mr. McPherson) Would you state your name please, sir?

A Clifford Hendry.

Q And what is your occupation, Mr. Hendry?

A Manager of Industrial Relations with the Magnavox Company of the Greeneville Plant.

Q How long have you held that position, sir?

A That title, probably six or eight years. I have been in Personnel almost twenty-four years in the Greeneville Plant.

Q In the Greeneville facility?

A Yes.

Q I want to direct your attention to May 21, 1970 and ask if the Union made any request to you concerning distribution of literature on Company property?

A Yes.

Q Would you relate what occurred concerning that requests?

A We were in a Step No. 3 Grievance Meeting, and Mr. Richard Fisher, the International Representative stated that they had a handbill that they wanted to pass out in the plant on the following Monday, I believe that was the day, and it took me somewhat by surprise. I advised him that I could not give permission for the distribution in the plant, since they had not been permitted to distribute on Company property, ever. And, he stated that a recent Supreme Court ruling had changed that, and he gave me a reference and he [96] asked that I check it and consider it at that time, and tell him my position the next day. Mr. Sites was out of the country at that time, but I did confer with some persons and advised Mr. Earl King, the President of the Local the following day that our answer would be "no".

Q Now, has the Union ever before made a request to distribute literature on Company property?

A Yes, there was one occasion when an exception was made. The Union, through the President which was at that time Dorothy Pullman, requested that they be permitted to distribute a small leaflet to employees in preparation for an election that they wanted to take up at the plant gate for the "City of Hope", which they explained to be a research hospital, a non-denominational, a non-racial, and a non-everything. In other words, anyone could be admitted.

And, as I recall, Mrs. Pullman called me from over at the Union office and made the request, and then I told them that I would check it out and get back with them. And, later we did agree for them to distribute little pamphlets so that an employee would know what the "City of Hope" was, and they did make their collections then at the gate. In 1965, they made a couple of more collections for the same purpose and in subsequent years, but membership was given notice by the bulletin board

notices and other means. The one years was the only year that they passed out the pamphlets.

[97] Q When you say bulletin board notices, you mean —What other means are you referring to now, by other means?

A We have a plant paper on Wednesdays that we carry news of interest to employees. Some items of the Union Stewards and so forth for various areas, and we also carried in that notation that the "City of Hope" solicitation would take place at that gate on a specific date.

Q Mr. Hendry, I believe the Union has represented employees for approximately sixteen years, is that not correct?

A The first Labor Agreement was in effect on May 1, 1955. They actually gained their representation in the election of December of 1954.

Q Now, throughout those years, has the Union ever made distribution of handbooks, anywhere?

A They've made distribution of handbills on the street or off Company property.

Q And have they done this, to your knowledge, every year throughout the period of representation?

A Well, it seemed to me that it would be every four or five months, sometimes maybe more frequently there have been several bulletins passed out.

Q Now, the Union does have bulletin boards provided for it for literature does it not?

A Yes.

Q Are these bulletin boards for the exclusive use of the [98] Union?

A Yes, sir they are. And, on each board is marked "Local 796, I.U.E. AFL-CIO, CLC", so that they are distinguished from other boards.

Q And, how many employees does your Company have, Union employees that your Company has at this time?

A About well, I would say twenty three hundred. Are you talking about active in the plant?

Q Yes.

A About twenty three hundred, maybe fifteen or twenty.

Q And, how many bulletin boards do you have in the plant facility?

A For the Union?

Q Yes.

A For the Union, it is specified in the current agreement. I believe there are three.

Q Do you not know of your own knowledge?

A I'm not sure, whatever is provided in the agreement, plus we have provided them with bulletin boards in the warehouses and so forth, which is not specified. In other words, that is in addition to what is in the negotiated agreement.

Q How many bulletin boards are there in addition to this?

A I believe there is one in each of the Union warehouses. I would say probably two in the warehouse locations.

Q Now, in addition to the bulletin boards, do you give to [99] the Union the names and address of all employees who are hired?

A Yes.

Q Does that include any employee who is rehired?

A Rehired and all, they get a copy of what and who we hire and rehire, an employee change of status we give them, and it covers hires and rehires, and so forth.

Q Mr. Hendry, has the Union ever—Let me rephrase that. In your capacity, are you involved with grievances that were filed with the Union?

A Yes.

Q And what is your involvement?

A Holding the Step No. 3 grievance meetings for the Company, and probably a—the arbitrational meeting if it is held and assist the final disposition of arbitrations.

Q Has the Union ever, to your knowledge, filed a grievance alleging that the Company's "No Distribution" rule wasn't fair?

A Not to my knowledge, no, sir.

Q Would you state, Mr. Hendry, whether or not the Company's "No Distribution" rule has been effect through-

out the time that the Union has represented the employees?

A Yes, sir, it has.

Q Have you had occasions where individuals have asked for permission to make distributions of literature?

[100] A Yes, sir, we have had requests from—I don't know how you mean the question. We have had requests for various types of sales and so forth and merchants and so forth. Of course, we have denied—

Q What about political activity campaigns?

A Political activities, we have not had distribution of. We have had requests, but we have refused distribution of this political pamphlets and so forth on Company property.

Q To your knowledge, Mr. Hendry, with respect or with exception of the "City of Hope" situation, has the Company ever permitted any one to distribute literature on Company property?

A No, sir. There are no exceptions that I can recall.

MR. McPHERSON: I have no further questions.

TRIAL EXAMINER: Do you have any Cross-Examination?

MR. ROLNICK: Yes, sir.

## CROSS-EXAMINATION

Q (By Mr. Rolnick) Has the Company distributed literature on Company property?

A We distribute our Plant Newspaper, that was mentioned earlier.

Q Fine. And in June of 1970, did you also distribute the Magnavox magazine to the employees on Company property?

A I believe that one time we did distribute the magazine. This is the only time.

[101] Q Do you post all matters that the Union hands you on bulletin boards, whenever they want something posted, do you post it?

A Yes, sir. There may have been exceptions over the years. The correct way—The contract I believe

provides the type of notice that we are able to post. I believe it excludes words of controversial matters. But, that has been very infrequent.

Q Lets assume for a moment that the Union wanted to post something in regard to a controversial nature, what would you do?

A Well, I would discuss it with them to see if we could arrive at a mutual understanding on it.

Q Go ahead, continue.

A I said that we have had, I know, of one occasion when they had a notice which I thought might be controversial and we had a discussion and changed some of the wording, and it was posted as the satisfactory need.

Q Now, what if the Union said, "No, we want to post the notice as it is"?

MR. McPHERSON: I object to that as being a conjecture.

MR. ROLNICK: Surely this gentlemen is the one man that makes that decision.

TRIAL EXAMINER: I think he can answer the hypothetical question. You can ask him what his position would be if the [102] matter was submitted as controversial under the rule.

THE WITNESS: If they brought a notice in which was controversial and we could not resolve it, I feel that by the Labor Agreement we would have the right not to post it. The Union would probably have the right to grieve by the interpretation of the provisions in the Agreement, and I think we would have that right.

Q (By Mr. Rolnick) They would have that right to grieve but not have the right to have it posted, is that right?

A That's right.

Q And, they would have—They would not have that right by the Company rules to distribute it on Company property?

A That's right.

Q When they hand you something for posting, is there a time period before you post it?

TRIAL EXAMINER: I don't understand the question?

Q (By Mr. Rolnick) Lets assume for the moment that the Union gives you a handbill at 2:00 o'clock and it is very important and they want it posted immediately, how long does it take to post it?

A We have worked with the Union in this, and to my knowledge anytime they have had a so called "rush" that was needed to be up on the board, it would be up within the hour after that. If they bring something in that can be posted later in the day, my secretary might wait until maybe she had [103] some items to put up on other boards. I don't recall any controversy as to our promptness in this.

Q You stated there were twenty-three hundred employees at present. Does that include employees on layoff?

A No, sir, that is in the plant.

Q How many employees do you currently have on layoff that you consider employees of the Company?

A I didn't check that figure. There aren't too many of them, maybe fifty or seventy-five.

Q How many employees did you have approximately in May of 1970?

A I don't know, I would have to look up some records. I don't have a thing on that.

Q You say that it is twenty-three hundred now, has it been as much as four thousand?

A No, we have never had four thousand.

Q Has it been as much as three thousand?

A At one time last year, I believe we had about three thousand people.

Q You stated that in the past on a few occasions, the Union has attempted to handbill at Plant No. 3, is that correct?

A They have passed out handbills at Plant No. 3.

Q Where did they hand out these handbills or pass them out?

A I did not personally see them passing the handbills out.

Q Does the Company dock an employee if that employee is [104] late to work?

A Yes.

Q Does it count against the employees record?

A In what way?

Q Well, do you have a certain number of discipline points, or something like that?

A Yes, I think you have to pass twelve minutes, I believe it is before you get into discipline points. But, prior to that, they would be docked pay as far as that is concerned if they are late.

Q What time do employees clock in in the morning to begin the shift?

A The majority of them at 7:00 o'clock.

Q Do the majority of your employees work on the first shift?

A Yes.

Q It runs from 7:00 until 3:30 p.m.?

A Yes.

Q Do the majority of your employees drive to work?

A They either drive or ride with someone.

Q In any event, they come to work in motor vehicles?

A Yes.

Q Do your employees live over a wide area, or do they live in Greeneville primarily?

A No, they do not live in Greeneville primarily.

[105] Q Do employees live as much as fifty or sixty miles away from the plant?

MR. McPHERSON: I am going to object. I don't see the relevancy and the materiality as far as where the employees live.

TRIAL EXAMINER: Would you explain to me, please?

MR. ROLNICK: Yes. If the issue is that the Union has adequate means to communicate with the employees, I wish to get an acknowledgment from the Company that these employees do—that they are spread out all over, and that presents a great problem for the Union in communicating. And, obviously I contend that the best means of communication is to be able to handbill at the plant on Company property.

TRIAL EXAMINER: Very well, go ahead. But, lets not spend too much time on that phase of it.

Q (By Mr. Rolnick) Mr. Hendry, the employees do live—some of them do live a good distance from the plant?

A Some of them do live a distance from the plant but I don't know of any fifty or sixty miles.

Q Do you have some that live in Johnson City?

A Yes, we have some in Johnson City.

Q That's about thirty miles from the plant?

A Yes, sir.

Q Do any of your employees live in North Carolina?

A We have some over here at Morrison, but that is only [106] about—It's closer than Johnson City actually to the state line over here.

Q Are you ever present in the mornings when the employees report to work?

A I suppose I have, sometimes.

Q Have you ever observed the employees as they drive into the Company parking lot at Plant No. 3?

A I don't know that I have particularly.

Q Or observed the time of the morning that they arrive?

A They come in in various times.

Q Does the greater amount of employees arrive at the plant close to 7:00 o'clock or as close to 7:00 as they can time it?

A I think around 6:30 is the heavy time.

* * * *

[107] Q (By Mr. Rolnick) In October, 1970, did your supervisors or group leaders distribute the United Fund literature to employees while they were working at the plant?

A I can't actually say of my own knowledge. Mr. Hanes usually handles that United Fund. We do make the United Fund available to the employees through the payroll deduction plan.

MR. ROLNICK: I have nothing further.

TRIAL EXAMINER: Do you have any questions, Mr. Janetzke?

Q (By Mr. Janetzke) Mr. Hendry, I'm not clear, are you saying that the total bargaining unit is twenty-three

hundred or the total unit members, that the total Union membership is twenty-three hundred?

A No, you—

Q Currently the total employees in the bargaining unit?

A Total number of hourly employees in the plant in the bargaining unit is little in excess of twenty-three hundred, I think.

Q How many of these total, work at Plant No. 3 on the day shift that you described as 7:00 to 3:30, I believe?

A Again, I would have to refer to records, and I would say about two thousand. It is a large majority, eighteen hundred to two thousand.

[108] Q How many are on the second shift at Plant No. 3?

A Well, I really don't know. Possible one hundred or so. There is maintenance stores and a little shipping, I think.

Q Also in Plant No. 2, how many shifts are there?

A There are some two shift operations over there for the second shift at plant two.

Q How many are on the first shift?

A And, again without referring to the records, approximately one hundred and fifty on the first shift.

Q What about the second shift?

A Building No. 4 is on second, and I guess there is not over fifty or seventy-five on the second shift.

Q When you had three thousand employees back in 1970, how many were on the first shift or the 7:00 to 3:30 shift at Plant No. 3?

A We had an assembly line on the second shift then.

Q I'm talking about the 7:00 to 3:30 shift at Plant No. 3.

A I was trying to go through the process of elimination to see what we had. I would guess twenty-five hundred, I don't know.

Q How many?

A Twenty-five—I think we said about two thousand now, twenty-four hundred, something like that.

Q Do they have to clock in by 7:00 or be in their work area by 7:00 when they are on the first shift?
[109] A They are suppose to be in their work area by 7:00, but they are not docked if they clock in by 7:00.

Q They the Company rule is that they have to be not only clocked in but in their work area, is that correct?

A This is what we ask.

Q And from the clocks, it may be a minute or two minute walk to the work area, is that correct, maybe three?

A Well, some clocks are adjacent to the area in which they work. The aisle way—Number of the clocks from the employee entrances, some maybe twenty feet from the end of the production line and so forth.

Q Is there any bus service down to the plant?

A There has been occasions in the past, but I don't think there is now.

Q In other words, unless you walk to work, you have to drive to work, is that correct?

A That's about it.

Q How many parking spaces is there at the plant?

A We manage to take care of all of the cars for people that drive. We made a study of it, but I don't have the figures. I don't know.

Q Now, you said that there was one Union notice that you considered to be controversial, would you tell us what that notice said?

A I don't believe I used the term "recent".

[110] MR. McPHERSON: I object to this as being irrelevant and immaterial. I don't see where it is pertinent to the issues involved in this case at all.

* * * *

[111] TRIAL EXAMINER: If he remembers, he may answer it.

THE WITNESS: The notice that the Local wanted to post, it had to do with a strike that was occurring in town, and a meeting to meet their needs or something to that effect. And, after discussion it with them, we worded the meaning to support this particular activity,

or something like that. We did go ahead and post it. It was a very minor change in the wording.

Q (By Mr. Janetzke) What one was there prior to that?

MR. McPHERSON: He has testified, Mr. Trial Examiner, that there was only one.

TRIAL EXAMINER: My recollection is that there was only one.

Q (By Mr. Janetzke) There was just one?

A That's the only one that I recall.

MR. JANETZKE: No further questions.

TRIAL EXAMINER: Is there any Redirect?

MR. McPHERSON: Yes, I have just one or two questions on Redirect.

## REDIRECT EXAMINATION

Q (By Mr. McPherson) When did Plant No. 3 open, Mr. Hendry?

[112] A In July, 1963.

Q Has the compliment work force in the bargaining unit remained relative constant since it opened?

A Relatively so, yes, sir. Some seasonal areas, but relatively it is the same.

Q Now, you stated earlier that the Union has, on occasion throughout the years made handbill or given handbills to the employees, is that correct?

A Yes.

Q There were not done on Company property, is that correct or not?

A My understanding is that it was on the street, the entrance to the parking lot, entrance to Company property.

Q But, not on Company property?

A No.

MR. McPHERSON: I have no further questions.

* * * *

[117] PROCEEDINGS

TRIAL EXAMINER MALLER: The hearing will be in order. This is the second day. Does the Respondent have anything further to offer?

MR. McPHERSON: I believe that Mr. Janetzke of the General Counsel has a statement that he would like to make, at which time I can then—

MR. JANETZKE: The Charging Party checked out Mr. Lingo's status while he was employed by the CIO. He was acting on behalf of the CIO, and I guess, organizing and assisting the I.U.E. So, I think the I.U.E. would be in this situation, hard pressed to maintain a—Cannot have some agency status on behalf of this Union.

So, I guess that will eliminate Mr. McPherson of any necessity of calling additional witnesses in that regard.

TRIAL EXAMINER: Very well.

MR. McPHERSON: I would like a little further clarification on the record, sir, but I don't have to do that. I would like to propose a stipulation mentioning that he was acting as an Agent for the I.U.E. during this period of time, involved in this testimony.

MR. JANETZKE: The Charging Party will stipulate to that.

TRIAL EXAMINER: Does the General Counsel stipulate to that?

[118] MR. ROLNICK: Yes.

TRIAL EXAMINER: Very well, the stipulation is noted.

MR. McPHERSON: Now, Mr. Trial Examiner, as I understand it, all Respondent's Exhibits have been put into evidence, is that correct, sir?

TRIAL EXAMINER: That is correct.

MR. McPHERSON: That includes Respondent's Exhibit No. 11 which was Page No. 24 of the Handbook?

TRIAL EXAMINER: That w s admitted by stipulation.

MR. ROLNICK: Your Honor, I think I had better qualify my joining of the last stipulation that Mr. Lingo was acting as an Agent. I agreed that Mr. Lingo did act as an Agent for the I.U.E. in certain capacities. Wheth-

er or not Mr. Lingo in the capacity in question, exceeded his authority as a matter of, I will argue.

TRIAL EXAMINER: What?

MR. ROLNICK: Whether he exceeded his authority as an Agent, I will argue that.

TRIAL EXAMINER: You will argue that he might have exceeded his authority, did exceed his authority?

MR. ROLNICK: That is correct. I don't intend to introduce evidence on this. It is an argument that I would make based on letters and the contractual provisions in the testimony.

TRIAL EXAMINER: With that exception, do you accept the [119] stipulation?

MR. McPHERSON: Well, that puts me in the position again of having to show the extent of his authority if that is now what we are going to be faced with. And, I am very much afraid that I will have to put on additional evidence to show the range of activities that Mr. Lingo carried on, on behalf of the Union. So, I had planned to question Mr. Clifford Hendry concerning his additional activities, and he is on his way down here.

And, if I might proceed into that area of questioning later and not further delay the proceedings, I would like to do so. It would be brief testimony. But, if I could, with that provision later?

TRIAL EXAMINER: I will let you go ahead and recall Mr. Hendry later for that testimony that you want to—

MR. ROLNICK: May we go off the record?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record. Counsel's have stipulated that a further statement of stipulation—

MR. McPHERSON: The Respondent would further propose as a stipulation that Mr. Lingo assisted the Union by representing the Local and it's representative at grievance meetings between the Union and the Company, and by representing the Local at arbitration hearings between the Union and the [120] Company. And, I think we've already got the contract in. That would be the extent of my stipulation.

MR. ROLNICK: I will stipulate to that.

TRIAL EXAMINER: Does the Charging Party stipulate to that?

MR. JANETZKE: The Charging Party will stipulate.

TRIAL EXAMINER: Very well, the stipulation is noted on the record.

MR. McPHERSON: I have one further thing that I would move to stipulate, and that is that Mr. Lingo also assisted the Union by representing it in the 1956 Contract Negotiations.

MR. JANETZKE: I am sorry, I missed that.

MR. McPHERSON: He negotiated in 1956.

MR. ROLNICK: I will stipulate to that.

TRIAL EXAMINER: Does the Charging Party stipulate to that?

MR. JANETZKE: Let me check the contract.

MR. McPHERSON: He did not sign the contract, but he was involved in the negotiations.

MR. JANETZKE: The Charging Party has no way of knowing whether he did or not. I want—I oppose the stipulation.

TRIAL EXAMINER: Can you agree to it?

MR. JANETZKE: Yes,—Oh, no, I am sorry, I do not agree to it.

TRIAL EXAMINER: The proposed stipulation fails for [121] lack of agreement.

MR. McPHERSON: Then, I would like to call Mr. Hendry for just one or two brief questions, if I may?

TRIAL EXAMINER: Mr. Hendry, please resume the stand.

Whereupon,

CLIFFORD HENDRY

was recalled as a witness by and on behalf of the Respondent and, having been reminded that he was still under oath, was further examined and testified as follows:

TRIAL EXAMINER: You were previously sworn and you are still under oath.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

Q (By Mr. McPherson) Mr. Hendry, did you attend the 1956 negotiation between the Company and the Union?

A Yes.

Q Did you make notes concerning those negotiations?

A Yes, sir.

Q And, in part of those notes, did you list the individuals who were present for the Company and for the Union?

A Yes.

MR. McPHERSON: We request that this be marked as Respondent's Exhibit No. 12.

(The document above referred to was marked Respondent's Exhibit No. 12 for identification.)

[122] MR. McPHERSON: I request that this document here be marked as Respondent's Exhibit No. 13.

(The document above referred to was marked Respondent's Exhibit No. 13 for identification.)

MR. McPHERSON: Mr. Trial Examiner, I think the Charging Party and the General Counsel will—I now so stipulate that based upon a review of Respondent's Exhibit Nos. 12 & 13, that Mr. Lingo did participate in the 1956 negotiations. And, if they will so stipulate, I will withdraw those two documents.

MR. JANETZKE: The Charging Party will so stipulate.

MR. ROLNICK: We will so stipulate.

TRIAL EXAMINER: Very well, in view of the stipulation that it is accepted, then Respondent's Exhibit Nos. 12 & 13 are withdrawn. They were not offered in any event.

MR. McPHERSON: At this time, Mr. Trial Examiner, the Respondent rests.

MR. ROLNICK: May I ask before we continue, has Respondent's Exhibit No. 11 been received?

TRIAL EXAMINER: Yes, by stipulation it was received in evidence.

MR. ROLNICK: Thank you. General Counsel calls as it's first rebuttal witness Mr. Bobby Kimery.
Whereupon,

BOBBY KIMERY

[123] was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated please. Spell your name for the record, please?

THE WITNESS: (Spelling) K-i-m-e-r-y, Bobby Kimery.

DIRECT EXAMINATION

Q (By Mr. Rolnick) Are you employed by Magnavox?

TRIAL EXAMINER: Have the witness identify himself for the record, please.

MR. ROLNICK: I thought he had.

Q (By Mr. Rolnick) State your name and address for the record please?

A Bobby Kimery, Route #2, Afton Tennessee.

Q Are you employed by Magnavox Company in Greeneville, Tennessee?

A Yes, I am.

Q In part of Plant No. 3?

A Yes.

Q How long have you been employed by Magnavox?

A Nineteen years.

Q Are you a member of the Local 796 of the I.U.E.?

A Yes, I am.

Q Do you have any office in that Union?

A Yes.

[124] Q What is that office?

A Vice President.

Q How long have you been Vice President?

A About a year and a half.

Q Directing your attention to the month of October, 1970, did you participate in the Union leaflet distribution at Plant No. 3?

A Yes, I did.

Q Do you recall the date?

A The eighth.
Q What time did you arrive?
A Six o'clock.
Q A.M. or P.M.?
A A.M.
Q At that time, did you—would you describe whether it was light or dark?
A It was dark.
Q Where did you take up position in order to pass out the leaflets? Where were you standing?
A I forget the name of the street. Anyway, it was right in front of the Union Hall.
Q Referring to General Counsel's Exhibit No. 7, what road were you on?
A Kiser Blvd.
Q As you are holding the Exhibit, looking at it as it is [125] marked "East", which of the two entrances were you standing at?
A This one. (Indicating.)
Q The one on the right?
MR. MCPHERSON: Perhaps if we could have them—Excuse me, Mr. General Counsel, if we could have them marked where he was standing, I think it would clarify the record.
TRIAL EXAMINER: Let's get our—Let's use a road pen so that we can mark that. Mark it with an "X".
Q (By Mr. Rolnick) Mark it with an "X" where you were standing.
A I was standing right in here. (Indicating.)
Q Right in the middle of the drive-way? Mark that with an "X", a big "X".
A It was right in here.

(The witness marked the Exhibit with an "X".)

TRIAL EXAMINER: Put a circle around that so that it will be more visible.
MR. ROLNICK: The record will show that the witness made an "X" in the middle of the right drive-way as you are facing East.
Q (By Mr. Rolnick) Now, as you are standing there, or as you were standing there, would you describe how the cars entered the parking lot as you were standing in the middle of that drive-way?

[126] A Well, they come off the Snapps Ferry Road to Kiser Boulevard, and as they come to the lane where I was handing out leaflets in, where they could come into it because there are two roads and they were coming two at a time.

Q You have one car passing you and one passing you on the right?

A Well, one coming here and another coming here, pointing right and left, and I was over here checking these over here. (Indicating.)

Q And you are standing in the middle of the entrance there?

A Yes.

TRIAL EXAMINER: Let the record show that the witness was indicating with his hands that cars entered on both sides of him.

Q (By Mr. Rolnick) Now, at any time during the morning, was the traffic getting heavy or does it maintain the same amount?

A Well, from 6:00 until 6:30 it is not too awfully heavy, but then after 6:30 and up until the time I left, it was getting awfully heavy.

Q What time did you leave?

A From five to six minutes until 7:00.

Q Why did you leave at that time?

A I had to get back and clock in and be at the shop at [127] 7:00 o'clock.

Q Are you suppose to be at your work station at 7:00?

A Yes.

Q Was there, at the time you left to go in to clock in, were there still employees arriving at the plant?

A Yes.

Q Is there any problem of any kind standing in the middle of the drive-way with two lines of traffic coming into the plant?

A The problems is, as everyone knows, as you come down the Boulevard, the cars coming here (Indicating.) are going into other plants. Of course, coming up the street, they would dart in to get ahead of another car

and you are standing there in the middle of the aisle. And, if the man is asleep, he is liable to run over you.

Q Do employees stop to get these leaflets?

A Well, sometimes they do. Most of the time they do.

Q As a result of the cars stopping, does this have any affect on the flow of the traffic back up the street?

A Sure, it backs it up down the street.

Q Okay. Directing your attention to the month of June, 1970, did you receive a Magnavox magazine from any—

MR. MCPHERSON: I think that has been very well established that that was handed out by the Company if that is what you are getting to.

[128] MR. ROLNICK: Can we stipulate that in June of 1970, the Company, thru Mr. Crow, at one guard gate, distributed the Magnavox magazine at the guard gate, and that there is normally an entrance at the guard gate which would allow several employees to come out at one time. But, by placing the fence in a certain position, you can cut it down to where the employees would have to come out at one at a time. This was done in order to facilitate the handing out of the magazine.

MR. MCPHERSON: I don't know about the closing of the gate to facilitate the handing out of the magazine, but we did or they did hand out the magazines. This has been according to my witnesses and we are not disputing that. I just don't know that we need to go into detail on it.

MR. ROLNICK: All right. Let me go in then just to placing the fence as to where the employees can go out.

TRIAL EXAMINER: All right, proceed.

MR. MCPHERSON: If he is going to testify to that, I will stipulate.

MR. ROLNICK: Fine. I'll accept the stipulation.

TRIAL EXAMINER: The stipulation as stated by the Counsel, the General Counsel is accepted by the Respondent.

MR. JANETZKE: And by the Charging Party.

TRIAL EXAMINER: And by the Charging Party, very well. This is noted for the record.

[129] Q (By Mr. Rolnick) Mr. Kimery, does the Union ever attempt—Has it ever attempted to distribute literature to employees in the parking lot after shift change in the afternoon or at shift change? Or after shift change?

A No.

Q Why is that, sir?

A You would really get run over then because, as you have noticed coming out of there, they come out four abreast and, of course, they are in a hurry to get home and you would get run over.

Q Regarding the Weekly News Letter which we have received certain testimony about, can you tell us Mr. Kimery, have you ever obtained copies of this News Letter while you were working at your job?

A Yes.

Q How did you get those copies?

A Somebody would go on lunch break and they would bring them back and we get them on the line.

Q I see. What is your job, sir?

A Repairman Second Class.

MR. ROLNICK: I have no further questions.

TRIAL EXAMINER: Does the Charging Party have any questions?

MR. JANETZKE: Yes, I have a few questions.

TRIAL EXAMINER: Okay.

[130] Q (By Mr. Janetzke) Mr. Kimery, when you were passing out leaflets at the time you left, could you tell us if cars were backed up along—let's take Kiser Boulevard and which way they were backed up and if they were? Let me ask you first, were the cars backed up?

A They were.

Q Now, I hand you what has been marked as General Counsel's Exhibit No. 7 and ask you if you can tell us how far along Kiser Boulevard, and let's take the southern direction, how far they were backed up?

A They were backed up down to—

TRIAL EXAMINER: Excuse me, just a moment. Now, let me see my copy of this now. Okay, go ahead. Yes, I see it down underneath here. Very well, proceed.

THE WITNESS: It was backed down to the Snapps Ferry Road when I left to go to the plant that morning.

Q (By Mr. Janetzke) How many cars can you get in between—How many cars line up from the entrance where you would be distributing down to Snapps Ferry Road?

A Oh, fifteen or twenty. I would something like that.

Q Did you have cars to observe what was occurring which would be to your left or north along Kiser Boulevard?

A Yes, because when I left, Margaret Brown—It was all clogged up there, so Margaret Brown—That's where I was at before I started into the plant. She went to the other [131] entrance to help them get it unclogged there.

Q What did you observe after you studied the traffic at Kiser Boulevard, north up along there?

A There is a curve about one hundred yards, I would say, and you could see cars run backed up through there.

Q Were you able from your position to see Industrial Road from where you were standing, or did you observe what was happening on Industrial Road?

A Not clearly.

Q You have indicated that you have observed all the traffic that comes out of that entrance or exit where you were distributing literature. You indicated that you observed that I guess at 3:30, that's the end of the shift?

A Yes.

Q From your observation, would it be possible to pass out leaflets there?

A Not the way those cars come out of there, no.

MR. JANETZKE: I have no further questions.

TRIAL EXAMINER: Do you have any Cross-Examination?

MR. MCPHERSON: Yes, sir.

## CROSS EXAMINATION

Q (By Mr. McPherson) Mr. Kimery, is that the way you pronounce it?

A Yes.

MR. MCPHERSON: May I see General Counsel's Exhibit No. 7 [132] that we have been marking?

(General Counsel's Exhibit No. 7 was handed to Mr. McPherson.)

Q (By Mr. McPherson) Now, just for clarification, Mr. Kimery, if you would look at this, there is no fence right along here. This is not a fence is it? (Indicating.)

TRIAL EXAMINER: You are indicating the East side?

MR. MCPHERSON: On the East side on Kiser Boulevard there is a line that goes along here and it curves that way. That is not a fence is it?

THE WITNESS: You mean in the parking lot?

Q (By Mr. McPherson) Yes.

A No, it is just a gate right at the entrance.

Q A parking entrance surely, a paved road?

A Yes, sir.

• • • •

TRIAL EXAMINER: Back on the record. Let the record [133] show that General Counsel's Exhibit No. 6, it appears to be—No. 7 that is, there appears to be a line drawn along the plant side of Kiser Boulevard which is labeled the East side of the plant. I am now drawing a wavey line along that solid line, and that wavey line indicates not a fence but a drainage ditch between the premises of the Respondent along Kiser Boulevard.

MR. JANETZKE: The Charging Party has no objection to that, we will stipulate.

TRIAL EXAMINER: Very well.

• • • •

Q (By Mr. McPherson) Mr. Kimery, Snapps Ferry Road comes down to this point right here, (Indicating.) does it not?

A Yes.

TRIAL EXAMINER: You are indicating that Snapps Ferry Road curves into Kiser, in junction with Kiser Boulevard.

Q (By Mr. McPherson) At the point where I am closing the "Y" is that not correct? In other words, all of this right in here?

A Yes.

Q Now, you were standing you say in the middle of the drive-way entrance, is that correct?

[134] A Yes.

Q Where the entrance is marked?

A Yes.

Q Were you on Company property?

A It's right just before you get—I went through the —No, I was just out on the edge of the road.

Q Right outside the gate that goes across that entrance, it can be closed, is that correct?

A At the street, yes.

Q So, you were not on Company property at the time you were doing this?

A No.

Q All right. Now, on the street itself, there is a shoulder, is there not? I mean, it's not pavement and then Company property? It is just like any other street where there is a shoulder that you can walk on?

A No, it is just all—It is the road that comes in there.

Q It comes in there where you turn in, but I am talking about the street itself on Kiser Boulevard. It is like a normal road where you have the paved portion and then you have a little portion along the side that is not paved?

A No, it is all paved.

Q It is all paved?

(The witness shook his head affirmatively.)

Q Now, who was with you at the time you were making these [135] handouts?

A Margaret Brown.

Q And she was not on Company property either?

A No, she was standing out there too.

Q Now, is that the only time that the Union has made handouts at that entrance?

A No, we have handed out there before.

Q When was the time before this last one that you testified to?

A I don't recall exactly the date. It's just that, you know, we do this every so often.

Q So, and when you do make your handouts, you al-

ways make them at those entrances like that, is that correct?

A Yes, sir.

Q Is that the only entrance that you use?

A No.

Q What other entrances do you use when you make your handouts?

A There is another one, of course, over on Kiser Boulevard where we use—

TRIAL EXAMINER: Let's put an "A" there.

Q (By Mr. McPherson) Are you speaking of right here? (Indicating.)

A Yes.

TRIAL EXAMINER: Mark that "A" with a circle.

[136] Q (By Mr. McPherson) What other entrances do you use?

A Right down here. (Indicating.)

Q Back here now? That would be on Company property wouldn't it?

A Yes, that's where it comes off Snapps Ferry Road at the railroad.

Q Is there anyplace else where you do this?

A No, just those three places.

Q Comes off Company property to get out there on the road?

A Yes.

Q And on these three places where we have marked them with an "X", an "A", and a "B", at no time do the employees stand on Company property, is that what you are testifying to?

A We stand there in the street.

Q You are not on Company property?

A Well, it is as, you know, of course, the road comes up through here and we turn off the street—We stand out there. (Indicating.)

Q Do you think you are on Company property or not?

A I wouldn't think so.

Q Okay. And, this has always been where the Union or how the Union has made it's handouts, is that correct?

A Yes.

Q How long have you worked for Magnavox?

A Nineteen years.

[137] Q Nineteen years?

(The witness shook his head affirmatively.)

Q So you have been there throughout the sixteen year history of the Union?

A Yes.

Q Is this the only time right now since—I think you said that you have been Vice President a year and a half, have you not?

A Yes.

Q Is this the only time in your history with the Company that you have held a position with the Union?

A No. I have held Sargent of Arms, I have been Steward.

Q If you would, tell us when you were Sargent of Arms?

MR. ROLNICK: Objection, it is irrelevant.

TRIAL EXAMINER: Is it as relevant as you think so?

MR. McPHERSON: Very well.

TRIAL EXAMINER: Very well, you may proceed.

THE WITNESS: Well, this—

MR. ROLNICK: Well, Your Honor, if I may, I can't see any relevance and I'm not about to take Mr. McPherson assertion that it connects something up. That couldn't possibly be relevant to the case. If he will enlighten me how it is relevant than I can—

MR. McPHERSON: Mr. Trial Examiner, I don't think it is Mr. Rolnicks responsibility as to whether he takes my [138] assertions or not. I believe that is within the perogative of the Trial Examiner.

MR. ROLNICK: This is rebuttal, Your Honor. It is a very limited rebuttal.

TRIAL EXAMINER: Just a moment. When an assertion is made that it's relevant and would be connected up. I would permit the testimony subject to the objection. If Counsel fails to connect it up to the issue, and it appears to you to be irrelevant, then you may make a motion to strike. Overruled subject to the objection, it is received. Proceed.

Q (By Mr. McPherson) Just to the best of your recollection, over a long period of time it is difficult I know.

A I believe it has been four years back, I believe. That was when I was Sargent of Arms. I wouldn't—I believe it was four years back.

Q And you were Steward also, is that correct-

A Yes.

Q Has that been earlier or has that been since you were Sargent of Arms or before you were Sargent of Arms?

A Both.

Q Both, before and since?

A Yes.

Q What about 1956, were you—Did you hold any position with the Union?

MR. ROLNICK: Objection. This is clearly beyond the [139] scope of rebuttal. This witness was put on to testify three very brief things, none of which is covered by the questions now being propoundered by Counsel.

TRIAL EXAMINER: I believe the—it appears to be beyond the scope of this unless you can formulate it otherwise.

MR. McPHERSON: All right, I won't insist on that.

Q (By Mr. McPherson) Mr. Kimery, let's go back to the distribution since you were involved with the Union in some capacity has it not been true, that the Union has passed out handbills in the manner you have described?

A Have we passed out handbills like this before?

Q Yes.

A Yes.

Q And, always in the same manner in which you have just described on that one occasion, is that not true?

A Yes, I believe we have always done it that way.

Q You have always done it that way?

A Yes.

Q As far back as you can remember, you have always done it that way?

A Well, we have had different plants.

Q At Plant No. 3?

A Yes, at Plant No. 3.

Q Going back to Plant No. 2 when that was fully

staffed with bargaining unit employees, you made the pass-outs at [140] Plant No. 2 in much the same manner of not getting on Company property?

MR. JANETZKE: Objection.

MR. ROLNICK: Objection.

MR. JANETZKE: It is clearly beyond the scope of Plant No. 2.

TRIAL EXAMINER: Sustained.

MR. McPHERSON: Mr. Trial Examiner, I—All right, I will withdraw that.

Q (By Mr. McPherson) Plant No. 8 has been in operation since 1968, is that not correct?

A Yes.

Q That is some seven years now?

A Right.

Q And for that seven year period, you have made your pass-outs on the road which were exactly as you have described now?

A Yes.

Q Mr. Kimerly, why didn't you come on the Company property and make the pass-outs?

A Because we have never been allowed to.

Q You have never been allowed to?

A No.

Q Why haven't you been allowed to? Are you saying that the Company had a rule prohibiting the distribution on [141] Company property, the distribution of literature on Company property?

MR. ROLNICK: Objection, it is a duplicity of questions.

TRIAL EXAMINER: Well, the answer would answer a lot of questions.

Q (By Mr. McPherson) You say that you have never been allowed to make the handouts on Company property?

A Yes.

Q Who would not allow you to do that, the Company?

A As far as I know, yes.

Q This has been true as far back as you can remember?

A Yes.

Q There is no doubt in your mind about that?

A That's where we have always had it. That is all I know, we have just handed them out at this point.

Q Because the Company had a rule that would not let you pass out that on Company property?

A I don't know about the rule. It is just that we have always done it this way.

Q If it is dangerous to do it this way and if it backs up traffic on Snapps Ferry Road, all the way back to Snapps Ferry Road and down Kiser Boulevard, why haven't you come on Company property to do that, you have been doing it for seven years?

A That is just what—We have always done it this way. [142] It is all I know.

Q Would the Company let you do it?

TRIAL EXAMINER: As you know.

THE WITNESS: I don't know, we have always been told to hand them out at the street there.

Q (By Mr. McPherson) When you say that you have always been told, by whom have you been told?

A By our officers.

Q By your officers?

A Yes.

Q When you say by "our officers", you mean by the Union officers?

A Yes.

Q Mr. Kimery, you stated I believe, correct me if I am wrong, in the evening when the employees leave, that they just zoom out these exits onto Kiser Boulevard, is that your statement? Is that correct?

A They come out four abreast. These two here would turn to the left and they would get out of the way, and then two more can be coming out of the parking lot, four abreast.

Q When a shift ends, is it not true that everyone reaches their cars within a few seconds of one another and then they stack up down there at the entrance to get out? That after the first three or four cars go out, the rest of them go out quite slowly?

[143] A No, they don't go out quite slowly.

Q They don't?

A No.

Q They do back up there, do they not?

A They back up there.

Q Once they get to the street, I guess they do pretty well take off, is that what you are saying?

A Well, they go out—Of course, there are two roads they can go out to go down to Snapps Ferry. Two will go out and the other two will sort of follow and it is just moving all of the time. Four of them will be at the road at the same time.

Q But, it has always been that way, hasn't it? Has it not?

A Yes.

Q That isn't something that is or has suddenly developed, say in a year, since last year?

A Well, we have in the last two or three years, I suppose.

Q In the last two or three years?

A For—Of course, we've got more people there in the last three or four years than we had back say five years ago.

Q In the last three or four years though, you have had relatively the same low and high employment?

A Yes.

* * * *

[145] Q (By Mr. McPherson) Mr. Kimery, you testified that the Company has a News Letter, is that not true?

A Yes.

Q And that you have received this News Letter while at your work station?

A Yes.

Q I believe your testimony was that this was brought back to you by another employee who had been on the regular break for lunch?

A Yes.

Q Now, these News Letters are put on racks or in boxes at various places throughout the plant, are they not?

A Yes.

Q They are not actually handed out, gone around to and handed out to the individuals, is that correct?

A They are put in boxes in the cafeteria and stuff.

Q They are there for—If you want one, you can take one, and if you don't want one, you don't have to take one, is that correct?

A That's right.

MR. McPHERSON: One moment please.

(Pause.)

Q (By Mr. McPherson) Mr. Kimery, one further question, how long in your opinion does it take the employees to get [146] out of the parking lot that you have described?

A Approximately fifteen or twenty minutes, something like that.

• • • •

## REDIRECT EXAMINATION

Q (By Mr. Janetzke) Mr. Kimery, prior to May of 1970, did any Company boss or any official of the Company, Supervisor, tell you that the Union was not allowed to distribute literature on Company property? Did anyone tell you personally?

A Even at that meeting we were told that.

Q When was that meeting?

A The exact date, I don't know, but it was back a month or so ago.

Q I am talking about prior to May of 1970?

A Oh, no.

Q Did any Company boss or official of the Company, any of the Supervisors of the Company, tell you that the Union could not pass out literature on Company property?

A No.

[147] MR. JANETZKE: No further questions.

MR. McPHERSON: Mr. Trial Examiner, I believe that there was my line of questioning that I was going into previously, and I would like to pursue that at this time.

TRIAL EXAMINER: I'm afraid it does, you may proceed.

## RECROSS-EXAMINATION

Q (By Mr. McPherson) Mr. Kimery, I want to hand you a handbook which has been discussed here, and ask you if you have ever seen that before?

A Not until yesterday.

Q Not until yesterday? Now, I want you to make sure of your answer now, is that correct or not?

A I have never seen it.

Q You have worked with the Company for nineteen years, is that correct?

A Yes.

* * * *

[148] MR. McPHERSON: I would request that this be marked as Respondent's Exhibit No. 14.

(The document above referred to was marked Respondent's Exhibit No. 14 for identification.)

MR. McPHERSON: I would like to substitute copies for [149] this Exhibit if I might?

TRIAL EXAMINER: Permitted. Permission is granted.

Q (By Mr. McPherson) Mr. Kimery, I show you what has been marked as Respondent's Exhibit No. 14, as it is here, and ask you if that is not a receipt signed by you? That is your signature dated 7-22-58, is that correct?

A Yes.

Q That is your clock number?

A No. 684, yes.

Q No. 684, I see. Now, Mr. Kimery, if you would sir, look in the back of this handbook entitled "You and Your Company", and tell me if that is not the same receipt as to what is shown in the back of this handbook?

A Yes, it looks the same.

Q And this receipt that you signed says, "I hereby sign and acknowledge receipt of booklet entitled "You And Your Company" and agree to study its contents carefully and abide by all the rules and regulations contained therein." Is that not correct?

A That's what it says.

* * * *

[150] CHARLOTTE SEXTON

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated please.

DIRECT EXAMINATION

Q (By Mr. Rolnick) State your name and address for the record.

A Charlotte Sexton, Box 4, Afton, Tennessee.

TRIAL EXAMINER: How do you spell your last name please?

THE WITNESS: (Spelling) S-e-x-t-o-n.

Q (By Mr. Rolnick) You are employed by Magnavox Company in Greeneville, Tennessee?

A Yes, I am.

Q How long have you worked at that Company?

A Since September of '54.

Q Are you a member of the Local No. 796 of the I.U.E.?

A Yes, I am.

Q Do you serve any capacity for that Union?

A Yes, I do.

Q What is that?

A Chief Steward.

Q How long have you been Chief Steward?

A Nine year and a half.

[151] Q Directing your attention to the month of June, 1970, did you have any conversation with any Supervisor or Agent of the Company with regard to the distribution of at a guard gate of Magnavox magazine?

A Yes, I have.

Q Who did you talk to?

A Fred Gettings.

MR. McPHERSON: If I may interrupt here, we can stipulate to that instead of going into it.

MR. ROLNICK: It is very short. The witness had a conversation with Mr. Fred Gettings, in which she asked

him in effect why you are doing this. And, his answer was that they were saving on the budget.

MR. McPHERSON: We will stipulate to that.

TRIAL EXAMINER: Who is this Mr. Gettings you are talking about?

MR. McPHERSON: Mr. Gettings is the Assistant to Mr. Clifford Hendry.

TRIAL EXAMINER: Representatives of the Management?

MR. McPHERSON: Yes.

TRIAL EXAMINER: Is the stipulation satisfactory?

MR. ROLNICK: Yes, it is.

MR. JANETZKE: I would suggest that the stipulation includes the position of the guard gate, that it appears towards the bottom of the General Counsel's Exhibit No. 7.

[152] TRIAL EXAMINER: You say towards the bottom. Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record. Let the record show that the guard gates referred to by Mr. Janetzke, has been marked with a capital "C" on General Counsel's Exhibit No. 7. Is that stipulation satisfactory to all parties?

MR. McPHERSON: Yes.

MR. ROLNICK: Yes.

MR. JANETZKE: Yes.

TRIAL EXAMINER: Very well, the stipulation is noted.

Q (By Mr. Rolnick) Have you had occasion to observe the build-up of traffic on occasions when the Union attempts to hand out the leaflets at the parking entrance to Plant No. 3?

A Yes, I have.

Q What is the condition of traffic on those occasions?

A Well, the traffic was blocked across the road and it was building up.

* * * *

[153] Q (By Mr. Rolnick) I believe you were telling

us about the condition of the traffic, the way it developed. Could you tell us about it?

A Well, it was prior to the negotiations of the present contract and they was handing out leaflets at the truck route going into the lower guard gate, and I was coming—

TRIAL EXAMINER: Excuse me, would you please indicate on General Counsel's Exhibit No. 7 where you are referring to?

THE WITNESS: Well, right here. (Indicating) I was right in here. (Indicating.)

TRIAL EXAMINER: Let the record show the witness indicated point "B".

THE WITNESS: Where I was stopped with the handbill.

TRIAL EXAMINER: Yes, you may proceed.

Q (By Mr. Rolnick) Were their cars between the point where you stopped and the entrance to the parking lot?

A Yes, there was.

Q Were they lined up waiting?

A They were lined up back to Snapps Ferry Road.

Q Do you know, of your own personal knowledge, whether any employees were late to work that day as a result of being [150] caught in this line of cars?

A Yes, they complained in the plant that they was late to work.

MR. ROLNICK: No further questions.

MR. JANETZKE: I have a question.

Q (By Mr. Janetzke) Which road did you come down, the Snapps Ferry or a different road?

A I come across the fair ground road at the stop sign.

Q And then you arrived at the point where Snapps Ferry Road ends and Kiser Road comes in?

A That's right.

Q What did you observe at that spot?

A The traffic was lined back out to Snapps Ferry

Road. While I was there, sitting there, someone that was in the line of traffic stopped for me to pull in the line of traffic.

Q Do you come down Fair Grounds Road?

A Yes.

Q Normally when you go to work in the morning?

A Yes.

Q When you normally come down, is there a line of traffic across Snapps Ferry Road backed up down the street?

A Well, it is according to what time I come to work. Between 6:00 and 7:00 o'clock it is pretty rough through there.

* * * *

[155] CROSS-EXAMINATION

Q (By Mr. McPherson) Miss Sexton, you say that you come down Fair Grounds Road when you come to work, is that correct?

A Yes, I do.

Q And what time do you normally come down there?

A At 6:30 in the morning.

Q At 6:30 in the morning?

A Yes.

Q And there is usually always traffic backed up there trying to get into the parking lot at that time?

A Yes.

Q And the traffic is pretty heavy through there most of the time, is that correct?

A Yes.

Q The same thing is basically true, is it not, when you leave work that the traffic is backed up coming out of the parking lot to get onto Snapps Ferry Road or Kiser Boulevard?

* * * *

[156] Q (By Mr. McPherson) It is backed up pretty well onto the parking lot, some people are coming out at the end of the shift, does it not?

A Well, it comes out of there in some different places. In some places they come out about three or four abreast.

Q But, they are still backed up and waiting to come onto the road?

A Some.

MR. McPHERSON: I have no further questions.

MR. ROLNICK: I have one further question.

REDIRECT EXAMINATION

Q (By Mr. Rolnick) I would like you to compare for me, if you will, the traffic or the back up of traffic on those mornings when the Union distributed literature at the entrances to the parking lot? Was the back up of traffic that would occur on any other mornings, could you tell us whether the back up is the same or worse or better or what?

A Well, if there is no one handing out leaflets, the traffic keeps moving. But, if there is a leaflet being handed out, then naturally it's going to—It just stops the traffic that's all. It crosses the railroad and on the [157] morning that I stopped to get my handbill, there was a car directly on the track.

* * * *

[158] CHARLES PRICE

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated please.

DIRECT EXAMINATION

Q (By Mr. Rolnick) State your name and address for the record please.

A Charles Price, 408 Park Street, Greeneville, Tennessee.

Q Mr. Price, are you employed by the Magnavox Company in Greeneville, Tennessee?

A Yes.

Q Are you employed at Plant No. 3?

A Plant No. 3, yes.

Q How long have you been employed by the Company?
A About twenty years and a half.
Q Directing your attention to the month of October, 1970, did you participate in the United Fund Drive of the Company?
A I did.
Q What did you do and how did you come to do it?
A My Foreman asked me to—If I would volunteer to help pass out some literature for the United Fund and to ask people if they would like to donate to this cause.
Q Who was this Foreman?
[159] A Alvin Miller.
Q Did you pass out United Fund literature?
A Yes.
Q Did you pass this out in the working areas of the plant? Did you pass this out on working time?
A I did.
MR. ROLNICK: No further questions.
TRIAL EXAMINER: Charging Party, do you have any questions?
MR. JANETZKE: No questions.
TRIAL EXAMINER: Do you have any Cross-Examination of this witness, Mr. McPherson?
MR. McPHERSON: Yes, your Honor.

## CROSS-EXAMINATION

Q (By Mr. McPherson) Mr. Price, is this the only time that you have passed out literature on Company property?
A As far as I know, that's the first time.
Q Is this the only time that a Supervisor has asked you to pass out literature on Company property?
A That's right.
Q Have you ever been involved in handbilling with the Union?
MR. ROLNICK: Objection.
TRIAL EXAMINER: Overruled.
THE WITNESS: I have on the streets.

[160] Q (By Mr. McPherson) But, not on Company property?
A Not on Company property.
Q Never on Company property?
A Never on Company property.
Q Why not?
MR. ROLNICK: Objection.
TRIAL EXAMINER: Sustained.

• • • •

[161] EARL KING

was called as a witness by and on behalf of the General Counsel and, having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated.

DIRECT EXAMINATION

Q (By Mr. Rolnick) State your name and address for the record, please.
A Earl King, Route #8, Greeneville, Tennessee.
Q Mr. King, are you employed by Magnavox Company in Greeneville, Tennessee?
A I am.
Q How long have you worked for that Company?
A Almost eighteen years.
Q Do you work at Plant No. 3?
A Yes.
Q Are you a member of Local No. 796 in the I.U.E.?
A Yes, I am.
Q Do you hold any office in that Union?
A Yes, I do, President of Local No. 796.
Q How long have you been President?
A About eighteen months.
Q Mr. King, can you tell me, is there any reason why [162] the Local does not mail notices to the bargaining units employed or to the employees?
A Yes, we have a good reason. For one thing, we don't have a—financially we are not able to take on this added expense, and they are so scattered over the country that it is very difficult to get the mail out to everybody.

And, a lot of them would come back, even though we did mail it. Addresses change and it is almost impossible to get it out in the mail.

Q Is there any cost factor involved in trying to handbill the employees as opposed to the mailing of the handbills to them?

A Yes, there is quite a bit more expense to try to mail it out. I don't know, I've thought about it and I think it costs around four hundred dollars maybe to mail these out. Something like that, four hundred dollars difference.

Q Additional beyond the cost of printing, I believe?

A Yes.

Q Is there any reason why the Union does not attempt to take these notices around and deliver them to the employees home?

A That would be impossible since they live so far away from the plant and scattered out all over the country. We just couldn't do it.

Q Is there any reason—

[163] MR. McPHERSON: I object to that line of questioning, Mr. Examiner, it calls for a conclusion as to whether it is possible or impossible.

TRIAL EXAMINER: It does call for a conclusion. The witness has explained the answer. Interrogate him as to the accuracy of his reasons.

Q (Mr. Rolnick) Mr. King, is there any reasons why the Union instead of seeking to pass out literature or leaflets on Company property, doesn't pass out these leaflets or notices at Union meetings?

A Well, they don't have a lot of members present at Union meetings to do any good. Maybe out of all the total members we've got, maybe unless there is something special, there's only about fifty people that come to these meetings.

Q Is there any reason why the Union rather than seek to distribute literature on Company property, doesn't attempt to proceed to put all notices on the Company bulletin board?

A Well, a lot of people don't look at the bulletin board, and we have a provision in the contract, if it's

of a controversial nature, they won't post it. And, maybe we need a chance to get something out in a hurry and we don't always have a way of knowing when it will be posted.

Q My last question, Mr. King, is there any reason why the Union rather than seek to distribute the literature at, or on Company property, will not or finds it difficult to distribute [164] this literature at the entrance to the parking lot?

A The entrance—Well, it's dangerous for one thing to stand out there. Most of the time, when most of the employees are working, we have to do it before daylight. It's dark and the weather conditions a lot of times, it's pretty bad standing out in the rain and the snow. To try to do it, it does present a hardship trying to get it out.

MR. ROLNICK: I have no further questions.

MR. JANETZKE: No questions.

## CROSS-EXAMINATION

Q (By Mr. McPherson) Mr. King, is this the first year that it has ever rained or snowed in Greeneville?

A No, sir.

Q Well, then it snowed last year, did it not?

A That's right.

Q And it also rained, did it not?

A That's right.

Q And the year before and the year before?

A Right on back as far as I can remember.

Q Why then suddenly after sixteen years do you feel such an urgent need to try and change what has been historically been the Union practice to hand out notices at the gate, Mr. King?

A We have always wanted to do this, but up until a few months ago, we did not know that we had this right. We did [165] not know that we had any help outside the company. We knew the Company's position and we felt it was futile to say anything about it.

Q What was the Company's position at the time?

MR. JANETZKE: Objection. It is beyond the scope of Direct.

MR. McPHERSON: It is a direct answer to his answer.

TRIAL EXAMINER: Overruled.

THE WITNESS: Would you repeat the question?

Q (By Mr. McPherson) You say that you knew it was against the Company's position. What was the Company's position?

A I knew that they had taken this position, that there would be no distribution on Company property.

Q You have always known that?

A Yes.

MR. ROLNICK: Objection.

MR. McPHERSON: I have no further questions. What about that answer?

TRIAL EXAMINER: The answer stands.

MR. McPHERSON: May I have one moment please?

TRIAL EXAMINER: Yes.

(Pause.)

MR. McPHERSON: I do have one or two other questions.

Q (By Mr. McPherson) Mr. King, you have been President for eighteen months, is that correct?

[166] A Almost maybe, not exactly.

Q Have you ever had the Company refuse to post a notice that you wanted posted on the bulletin board?

A No, it hasn't been presented, anything that is controversial.

Q Now, when you do hand out these handbills at the edge of the Company property, not everyone takes a handbill, is that correct?

A No, they don't.

Q Now, when you say that not everyone reads the bulletin board, how do you know that not everyone reads the bulletin board?

A Well, I have posted notices and they have even missed that about meetings. They say that they didn't know that we were going to have a meeting, even though it was on the board. Like I have had them to tell me that they didn't come to the meeting because they didn't know about it, and it was posted on the bulletin board.

Q Mr. King, when you have given notices to the personnel to be posted, they have almost been posted immediately or on the same day, is that not correct?

A Yes.

Q And is it not true also, Mr. King, that when you have had something you wanted to go up right away and you have told personnel, that they have gotten it up at a time [167] satisfactorly to you?

A Yes, within a reasonable time, yes.

Q You have never had any problems in the plant concerning that matter?

A No.

MR. McPHERSON: I have no further questions.

## REDIRECT EXAMINATION

Q (By Mr. Rolnick) Let me clear up one of the mysteries in this case. Can you tell us how you first learned that you had the right to distribute literature on Company property, and when you learned it?

A Yes, sir, it was at a District Counsel meeting in Youngstown, Ohio, when I first learned that we had the right that other Unions had this right. I thought that if we had the right, then I wanted it too. I learned this in Youngstown, Ohio, District No. 7 meeting, and I believe it was the latter part of March in 1970.

Q Have you ever had a leaflet prepared that you did not submit to the Company for fear that the Company would reject it as being controversial?

A Yes.

* * * *

[168] RECROSS-EXAMINATION

Q (By Mr. McPherson) Mr. King, now when you learned about this so-called right, did they explain that these cases that they were speaking of involved an organizational campaign?

A I don't remember just what the case was. I just—

Q You don't remember how it was, is that right?

A I remember what Counsel said.

Q That you had the right to distribute literature on Company property?

A That the Union should have that right.

Q They didn't say whether there was an organizational campaign going on?

A No, sir.

Q They didn't say whether or not there was a Union attempting to oust another Union, or get rid of another Union?

A No.

Q They didn't say whether or not the courts had passed on that or what?

A No, I don't recall.

Q When you learned of this, Mr. King, did you come back and file a grievance saying that the rule was unfair?

A No, I did not.

Q Did you—You didn't go out and just make a hand-out on [169] Company property and ignore the Company, did you?

A No, sir. You mentioned the fact of whether I filed a grievance, and we followed the usual procedure and talked about it first and asked for them to let us.

Q Did you ever file a grievance after you were denied the opportunity?

A No.

Q You have a grievance procedure, don't you?

A That's right.

Q In the contract?

A Yes.

Q Mr. King, you have been President for eighteen months and have you held other Union positions?

MR. ROLNICK: Objection.

TRIAL EXAMINER: Overruled.

THE WITNESS: Only one. Several years back I was Shop Steward.

* * * *

[171] MR. ROLNICK: That concludes the General Counsel's rebuttal.

TRIAL EXAMINER: Does the Respondent have anything further to offer?

MR. McPHERSON: Yes, I do. I would like to recall Mr. John R. Sullivan.

MR. ROLNICK: Your Honor, I believe that the Charging Party might have an opportunity for rebuttal.

MR. JANETZKE: The Charging Party would like to call one witness.

[172] TRIAL EXAMINER: Of course, the Charging Party is permitted.

Whereupon,

JAMES J. KELLEY

was called as a witness by and on behalf of the Charging Party and, having been first duly affirmed, was examined and testified as follows:

TRIAL EXAMINER: Be seated.

DIRECT EXAMINATION

Q (By Mr. Janetzke) State your name and address for the record, please.

A James J. Kelley, Route #4, Greeneville, Tennessee.

TRIAL EXAMINER: How do you spell your last name?

THE WITNESS: (Spelling) K-e-l-l-e-y.

Q (By Mr. Janetzke) Are you employed at the present time?

A Yes.

Q Who is your employer?

A Magnavox Company of Tennessee.

Q How long have you been with Magnavox?

A Nineteen years, five months, and twenty-nine days.

Q What is your job?

A I am a repaireman first class.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

[173] TRIAL EXAMINER: Back on the record.

Q (By Mr. Janetzke) Are you represented by a Labor Organization?

A Yes.

Q Is that Local No. 797?

A Yes, it is Local No. 796 of the I.U.E.

Q Do you hold any position in that Union?

A Yes, I hold a position as Chaplain and I am a member of the Negotiation Committee.

Q I want to direct your attention—Have you ever engaged in the literature distribution?

A Yes, many times.

Q I direct your attention to the last leaflet, when was it handed out?

A October the 8th, 1970.

Q I hand you General Counsel's Exhibit No. 7 and ask you if you can identify the spots where you stood for that distribution of literature?

A Yes, sir, on the ramp where you turn into the parking lot off of Snapps Ferry Road.

Q You had the same route where the "B" was, is that correct?

A Yes.

Q Was anyone else with you?

A Elizabeth Channel.

[174] Q Who is she? Does she hold any position in the Union?

A Yes, she is a Recording Secretary.

Q Do you know who she is employed by?

A Magnavox Company of Tennessee.

Q In reference to that drive area, where did you stand? To the side, the middle, or where?

A We stood in the middle of the aisle.

Q Who is "we"?

A Elizabeth and I.

Q Why did you stand in the middle?

A Because you had to get cars coming in on both sides, and sometimes cars only had to get in that way to get to—To give them the leaflets, you had to stand on the drivers side.

Q Were you standing towards the middle or towards the side?

A No, we were both standing in the middle.

Q Why was it necessary for both of you to stand in the middle?

A Because we could only get every other car coming. You couldn't get a leaflet to every car.

Q You mean that she would take a car and then I would take the next car and she would take the next one, is that right?

A Yes.

Q Now, at any time during the period—Let me ask you this, [175] what time did you arrive there?

A Approximately 6:00 o'clock in the morning.

Q What time did you leave?

A About 6:50. We ran out of literature and leaflets and we went to the next gate.

Q Now, at any time while you were there, was there ever a situation that created a hazard there to your well being?

A Well, it was raining that morning. It was drizzling rain, poor visibility I guess, and I stepped back from handing out a leaflet and almost got hit by a Company tractor-trailer that was leaving the Shipping area and going out to the main gate or the main road.

Q What stopped you from getting hit?

A Elizabeth yelled at met to get out of the way.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

Q (By Mr. Janetzke) You indicated that apparently there were trucks coming out?

A Cars and trucks both coming down on this Route #5, going out.

Q Why would cars be coming out?

A They would go up and discharge passengers out of them like maybe a man and his wife and he works someplace, and he lets her out and comes back out and goes to his job some- [176] place else or go back home or wherever he goes.

Q That would involve about ten minutes to seven?

A Yes, we ran out of literature.

Q You and Elizabeth?

A Yes.

Q Where did you go then?

A We went to the first gate on Kiser Boulevard, the first one from our position.

Q I hand you General Counsel's Exhibit No. 7 and ask you whether you can identify—

MR. McPHERSON: This seems awfully redundant.

TRIAL EXAMINER: I don't know, but we are here so—

MR. JANETZKE: Are you willing to stipulate that it is extremely dangerous conditions that people pass out leaflets to cars and back up the traffic, and that it causes people to be late for work?

MR. McPHERSON: No, I am not going to stipulate to that. You put that testimony on at least by two other witnesses.

THE WITNESS: This right here. (Indicating.)

Q (By Mr. Janetzke) You both came here where the "X" appears?

A Right.

Q How long did you pass out leaflets there?

A Until 7:00. We got up there when it was probably it was five or six minutes until 7:00 when we reached out there, and [177] we had taken Bobby Kimery's place. He was working at the plant that day and he had to leave to punch in, and Margaret Brown moved to the next gate up, and we took their place and handed out there until 7:00 o'clock.

Q You handed out until 7:00?

A We quit at 7:00 o'clock.

Q What was the condition of the traffic so far?

A There was still traffic coming in at 7:00 o'clock. They were lined up and still coming in.

Q Where were they lined up?

A At the entrance gate, the entrance coming into the parking lot.

Q Where you were distributing literature?

A Yes.

Q Now, could you tell us where those employees could be punched in and get to their work area? Could they do it?

A No, sir, they could not, because they had to park and go to the clock, which is quite a ways from where

they had to park. The upper side of the parking lot, the far side of the lot.

Q Did you take any part in the United Fund campaign?

A Yes. I was one of the solicitors.

Q Pardon?

A I was one of the solicitors.

Q As a solicitor, what did you do?

[178] A I contacted people in our department and gave them a pamphlet that described the United Fund action and what we were giving for. What each one got, except the "Y". They didn't have a "Y" on there because it was newly formed at Greeneville, but they told us to tell them that they were getting a certain percentage of the YMCA.

TRIAL EXAMINER: Who told you that?

THE WITNESS: They told us this as a group.

TRIAL EXAMINER: Who are "they"?

THE WITNESS: The fellow who made the speech. The head of—I don't know his name, but I believe Mr. Sites introduced him in the meeting that we had at work.

TRIAL EXAMINER: Which Mr. Sites?

THE WITNESS: Chief Industrial Relations.

TRIAL EXAMINER: Okay. Off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

Q (By Mr. Janetzke) When you were distributing for United Fund, were you on or off Company time?

A On Company time.

Q On or off Company property?

A On Company property.

Q Now the people you distributed to, what did you pass out to the people?

A I passed pamphlets out that described the various [179] organizations and what percentage of the United Fund they got.

Q Were they on or off Company time?

A On Company time.

Q On or off Company property?

A On Company property.

MR. JANETZKE: No further questions.

TRIAL EXAMINER: Does General Counsel have any questions? Do you have any questions of this witness?

MR. ROLNICK: No questions.

TRIAL EXAMINER: Cross-Examination.

CROSS-EXAMINATION

Q (By Mr. McPherson) Mr. Kelley, the Union has always made their handouts in the manner in which you described, is that not correct?

A Yes.

Q So, the procedure that you described is nothing new, is it?

A That is right.

Q And you have always had cars and trucks coming out of that entrance there?

A That's right.

Q That's been true ever since the Union has been there, is it not?

A As far as my memory shows me, yes, sir.

[180] Q Now, you say you ran out of material?

A We ran out of leaflets that we were passing out. We ran out at this point.

Q So, you were giving them to every car? You were giving them to car one and your fellow worker would give them to car two?

A Some of the cars would not take the leaflets. We handed them to some people that wouldn't take them, but we tried to give them to every car, yes.

* * * *

JOHN R. SULLIVAN

was recalled as a witness by and on behalf of the Respondent and, having been reminded that he was still under oath, was further examined and testified as follows:

[181] TRIAL EXAMINER: You have previously been sworn and you are still under oath.

DIRECT EXAMINATION

Q (By Mr. McPherson) Mr. Sullivan, you stated that in 1956, you were employed by the I.U.E., is that correct?

A That is correct.

Q That you worked here at Greeneville assisting the Local concerning certification of selection, is that correct?

A That is also correct.

Q Did the Local have a News Letter that they published here at that time?

A There were leaflets put out if that is what you mean, yes.

MR. McPHERSON: I would like to have this marked as Respondent's Exhibit No. 15.

(The document above referred to was marked Respondent's Exhibit No. 15 for identification.)

MR. McPHERSON: If I may, I would like to obtain the original and submit the two copies for that?

TRIAL EXAMINER: Permission is granted. Is this the only copy that you have?

MR. McPHERSON: This is the original.

TRIAL EXAMINER: You may have it.

Q (By Mr. McPherson) Now Mr. Sullivan, I hand you Respondent's Exhibit No. 15 and ask if you can tell me what [182] that is?

A This is a leaflet we put out prior to the election of March 20. It was put out by the Local.

Q It was put out by the I.U.E. Local, is that correct?

A Yes.

Q The Local that represents the employees at Magnavox?

A Yes.

Q Did you help prepare this?

A Yes.

Q This leaflet?

A Yes.

MR. McPHERSON: Mr. Trial Examiner, I would like to call your attention to Page No. 2 of the leaflet, on the lower left hand column that which states for the Company's rules is concerning—Just what the Company's

rule is concerning the distribution of literature on Company property. The document speaks for itself.

I would now move to introduce that document into evidence as Respondent's Exhibit No. 15. And, I have no further questions of the witness.

TRIAL EXAMINER: Any objections?

MR. ROLNICK: I object. This is not part of the rebuttal. This is probably something that might come in the Respondent's case in chief. It is too late to start putting in documents like this.

[183] TRIAL EXAMINER: What is the Charging Party's position?

MR. JANETZKE: This is proper for the Respondent to put in as its original defense. At this time, further—There is no establishment even in the leaflet itself, what it is all about.

TRIAL EXAMINER: I will receive Respondent's Exhibit No. 15 into evidence.

(The document above referred to, heretofore marked Respondent's Exhibit No. 15, was received in evidence.)

MR. McPHERSON: I have no further questions.

TRIAL EXAMINER: Is there any Cross-Examination?

MR. ROLNICK: Your Honor, I don't waive my objection to the receipt of this document.

TRIAL EXAMINER: Of course not.

MR. ROLNICK: I'll ask him a question.

CROSS-EXAMINATION

Q (By Mr. Rolnick) Mr. Sullivan, the document which has been received in evidence as Respondent's Exhibit No. 15, this was put out by the Union during a campaign just prior to the certification of election, was it not?

A That is correct.

* * * *

(2-67)

Budget Bureau No. 64-R001.22

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

## CHARGE AGAINST EMPLOYER

| INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring. | DO NOT WRITE IN THIS SPACE<br>Case No. 10-CA-8555<br>Date Filed 8-27-70 |
|---|---|

### 1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

| a. Name of Employer | b. Number of Workers Employed |
|---|---|
| The Magnavox Company of Tennessee | approximately 3,000 |

| c. Address of Establishment (Street and number, city, State, and ZIP code) | d. Employer Representative to Contact | e. Phone No. |
|---|---|---|
| Snapps Ferry Road<br>Greeneville, Tennessee | Byran D. Sites, Director<br>Industrial Relations | (615)<br>638-6472 |
| f. Type of Establishment (Factory, mine, wholesaler, etc.)<br>Factory | g. Identify Principal Product or Service<br>Television and sound products | |

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and _____ (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about May 1, 1970, it, through its officers, agents and representatives, has interfered with, restrained and coerced and is interfering with, restraining and coercing employees of The Magnavox Company of Tennessee in the exercise of their rights to self organization, to form, join or assist labor organizations, to bargain collectively through agents of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection, or to refrain from any or all such activities, which rights are guaranteed in Section 7 of the Act, by conduct including its unlawful enforcement of a no-solicitation rule so as to prohibit distribution of all literature on Company property including nonwork areas on the employee's own time.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)
International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 796

| 4a. Address (Street and number, city, State, and ZIP code) | 4b. Telephone No. |
|---|---|
| 3461 Office Park Drive, Kettering, Ohio 45439 | (513)<br>294-1491 |

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)
International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC

### 6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ General Counsel, District 7
(Signature of representative or person filing charge) (Title, if any)

Address: 3461 Office Park Drive, Kettering, Ohio 45439 (513) 294-1491 (Telephone number) August 24, 1970 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 788-071

(6)

Case

August 27, 1970

Re: Case No. 10-CA-8555

The Magnavox Company of Tennessee
Snapps Ferry Road
Greeneville, Tennessee 37743

Gentlemen:

A charge has been filed with this office alleging that you have engaged in, and are engaging in, unfair labor practices within the meaning of the National Labor Relations Act, as amended. A copy of the Charge is herewith served upon you. Also enclosed is a copy of Form NLRB-4541, pertaining to our investigative and voluntary adjustment procedures, and the right of any party to be represented by counsel or other representative. A Notice of Appearance form (NLRB-4701) is enclosed for your use in the event you choose to have a representative appear in your behalf.

You, and the Charging Party, and all parties to this proceeding who are served with a copy of this letter, should promptly submit to the Board Agent named below a statement of position and complete written account of all the facts and circumstances which relate to the violations alleged. Also, statements of witnesses and any other evidence in support of a party's position may be submitted.

Your cooperation with this office is invited so that all the facts and the positions of the parties can be considered.

Very truly yours,

435518

Walter C. Phillips
Regional Director

Encls.: Charge (1)
Forms NLRB-4541 and 4701

Docket No. [illegible] OFFICIAL EXHIBIT No. Gen. Counsel's 1-B

REGISTERED MAIL, RETURN RECEIPT REQUESTED

cc: Electrical, Radio Workers and its
Local 706
Attn: Ronald H. Janetzke, General Counsel,
District 7
3561 Office Park Drive
Kettering, Ohio 45439

In the matter of The Magnavox Co. of Tenn.
Date 9-21-71 Witness [illegible] for Bd.
No. Pages 1 w/ card

| Case Assigned To: | Telephone No. |
|---|---|
| Louis Lipsitz | 526-3731 |

107

# UNITED STATES OF AMERICA
# BEFORE THE NATIONAL LABOR RELATIONS BOARD
# TENTH REGION

**Case No. 10-CA-8555**

**THE MAGNAVOX COMPANY OF TENNESSEE**

**and**

**INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL 796**

## COMPLAINT AND NOTICE OF HEARING

It having been charged by International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 796, herein called the Union, that The Magnavox Company of Tennessee, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1.

A copy of the charge, filed on August 27, 1970, was served upon Respondent by registered mail on August 27, 1970.

2.

Respondent is, and has been at all times material herein, a Delaware corporation, with an office and place of business located at Greeneville, Tennessee, where it is engaged in the manufacture and sale of television and sound products.

3.

Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped finished products valued in excess of $50,000 directly to customers located outside the State of Tennessee.

4.

Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

At all times material herein Respondent has maintained and enforced in the plant the following rule:

> "Soliciting of any kind on company property during working hours will not be permitted."

7.

Since on or about May 21, 1970, Respondent, by maintaining and enforcing the provision set forth in paragraph 6 above, has prohibited its employees from distributing literature on behalf of the Union during employees' non-working time in non-working areas of Respondent's premises.

8.

The acts of Respondent alleged in paragraphs 6 and 7 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 14th day of January, 1971, at 10:00 a.m., Eastern Standard Time, in the U.S. Post Office and Federal Building, Greeneville, Tennessee, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations

Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as Taken From the Board's Published Rules and Regulations and Statements of Procedure, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Atlanta, Georgia, this 16th day of November, 1970.

/s/ Walter C. Phillips
WALTER C. PHILLIPS, Regional Director
National Labor Relations Board
Room 701, 130 Peachtree Street, N.E.
Atlanta, Georgia 30308

Form NLRB-4668
(9-67) (C CASES)

## SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE CASES AS TAKEN FROM THE BOARD'S PUBLISHED RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in Washington, D. C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Trial Examiner, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record—for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Trial Examiner conducting the prehearing conference will be the one who will conduct the hearing; and *it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference.* No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript

of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcrip other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Trial Examiner who will fix the time for such filing.

*Attention* of the parties is called to the following requirements laid down in Section 102.42 of the Board's

Rules and Regulations with respect to the procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D. C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. All briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 102.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

Form NLRB-877
(11-56)

# UNITED STATES OF AMERICA
# BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE MAGNAVOX COMPANY OF TENNESSEE

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL 796

Case No. 10-CA-8555

AFFIDAVIT OF SERVICE OF Complaint and Notice of Hearing with NLRB Form 4668 attached

DATE OF MAILING November 16, 1970

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid registered/certified mail upon the following persons, addressed to them at the following addresses:

435420

George K. McPherson, Jr., Attorney
Smith, Currie & Hancock
1405 Fulton National Bank Building
Atlanta, Georgia 30303

435421

The Magnavox Company of Tennessee
Snapps Ferry Road
Greeneville, Tennessee 37743

International Union of Electrical, Radio
and Machine Workers, AFL-CIO-CLC and its Local 796
Attn: Ronald H. Janetzke, General Counsel, District 7
3461 Office Park Drive
Kettering, Ohio 45439

435422

Docket No. [illegible] OFFICIAL EXHIBIT No. [illegible]

[illegible]

[illegible] The Magnavox Co. of Tenn.

[illegible] Reporter BM

No. Pages 1 to 1 / 3 Copies

E. J. McDermott

Subscribed and sworn to before me

this 17th day of November, 19 70

Evelyn Francis Designated Agent.

NATIONAL LABOR RELATIONS BOARD

1(d)

GPO 889-884

114

OFFICIAL EXHIBIT No. GENERAL COUNSEL'S No. 1-E

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TENTH REGION

Case No. 10-CA-8555

THE MAGNAVOX COMPANY OF TENNESSEE

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, AND ITS LOCAL 796

## ANSWER

Respondent, The Magnavox Company of Tennessee, files this its Answer to the Complaint in accordance with Section 102.20, 102.21 and 102.23 of the National Labor Relations Board's Rules and Regulations as follows:

1.

Respondent admits service upon it of a copy of the charge on or about the date alleged in Paragraph 1 of the Complaint, but has insufficient knowledge to admit or deny the other allegations set forth in the paragraph.

2.

Respondent admits that it is engaged in the manufacture and sale of television and sound products with an office and place of business located at Greeneville, Tennessee. Respondent denies, however, that it is a Delaware corporation and states that it is a corporation of the State of Tennessee.

3.

Respondent admits the allegations in Paragraphs 3, 4, and 5 of the Complaint.

4.

The Respondent denies the allegation set forth in Paragraph 6 of the Complaint.

5.

Respondent admits that it does prohibit the distribution of literature on behalf of the Union at all times in nonwork areas of Respondent's premises. Respondent denies all other allegations set forth in Paragraph 7 of the Complaint.

6.

Respondent denies the allegations set forth in Paragraph 8 of the Complaint.

By way of further answer to said Complaint, Respondent denies that it has violated or its violating the National Labor Relations Act as amended in any way and more specifically denies that it has violated or is violating Section 8(a)(1) of the Act.

WHEREFORE, having fully answered, Respondent prays that the Complaint be dismissed in its entirety.

Respectfully submitted,

SMITH, CURRIE & HANCOCK
By /s/ George K. McPherson, Jr.
GEORGE K. MCPHERSON, JR.
Attorneys for Respondent

1405 Fulton National Bank Building
Atlanta, Georgia 30303
521-3800

## CERTIFICATE OF SERVICE

This is to certify that I, the undersigned, have this day caused to be served by Certified Mail, Return Receipt Requested, the original and four copies of the attached Answer of Respondent on the Regional Director, National Labor Relations Board, Region Ten, Atlanta, Georgia 30308, and one copy of the above Answer on the below-named parties:

International Union of Electrical,
Radio and Machine Workers,
AFL-CIO, CLC
3461 Office Park Drive
Kettering, Ohio 45439
Attention: Ronald H. Janetzke

Local 796
International Union of Electrical,
Radio and Machine Workers,
AFL-CIO, CLC
Kiser Boulevard
Greeneville, Tennessee 37743

Dated this 24th day of November, 1970.

/s/ George K. McPherson, Jr.
GEORGE K. MCPHERSON, JR.

FORM NLRB-858
(6-54)

# UNITED STATES OF AMERICA
# BEFORE THE NATIONAL LABOR RELATIONS BOARD

## REGION 10

THE MAGNAVOX COMPANY OF TENNESSEE

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL 796

Case No. 10-CA-8555

## ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from January 14, 1971 to February 9, 1971, same time and place.

DATED at Atlanta, Georgia this 6th day of January, 1971.

William J. Rowan

Acting Regional Director,
National Labor Relations Board.

GPO 840-858

1(f)

Form NLRB-4727 (11-66)

# UNITED STATES OF AMERICA
# BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE MAGNAVOX COMPANY OF TENNESSEE

and

Case No. 10-CA-8555

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL 796

**AFFIDAVIT OF SERVICE OF** Order Rescheduling Hearing

**DATE OF MAILING** January 6, 1971

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid registered/certified mail upon the following persons, addressed to them at the following addresses:

George K. McPherson, Jr., Attorney
Smith, Currie & Hancock
1405 Fulton National Bank Building
Atlanta, Georgia 30303

435870

The Magnavox Company of Tennessee
Snapps Ferry Road
Greeneville, Tennessee 37743

435871

International Union of Electrical, Radio and
Machine Workers, AFL-CIO-CLC and its Local 796
Attn: Ronald H. Janetzke, General Counsel, District 7
3461 Office Park Drive
Kettering, Ohio 45439

435872

Docket No. [illegible] OFFICIAL EXHIBIT No. General Counsel's # 1-G

[illegible]

In the matter of: The Magnavox Co. of Tenn.

Dated 1-7-71 Reporter BTL

No. Pages 1 to 3 pages

E. J. McDermott

Subscribed and sworn to before me

this 7th day of January, 19 71

Evelyn Francis Designated Agent.
NATIONAL LABOR RELATIONS BOARD

1(g)

The Magnavox Company of Tennessee
Case No. 10-CA-8555

INDEX AND DESCRIPTION OF FORMAL DOCUMENTS

General Counsel's Exhibit 1(a) Original charge dated 8-27-70

1(b) Affidavit of Service of 1(a) dated 8-27-70

1(c) Complaint and Notice of Hearing dated 11-16-70 with NLRB Form 4668 attached

1(d) Affidavit of Service of 1(c) dated 11-16-70

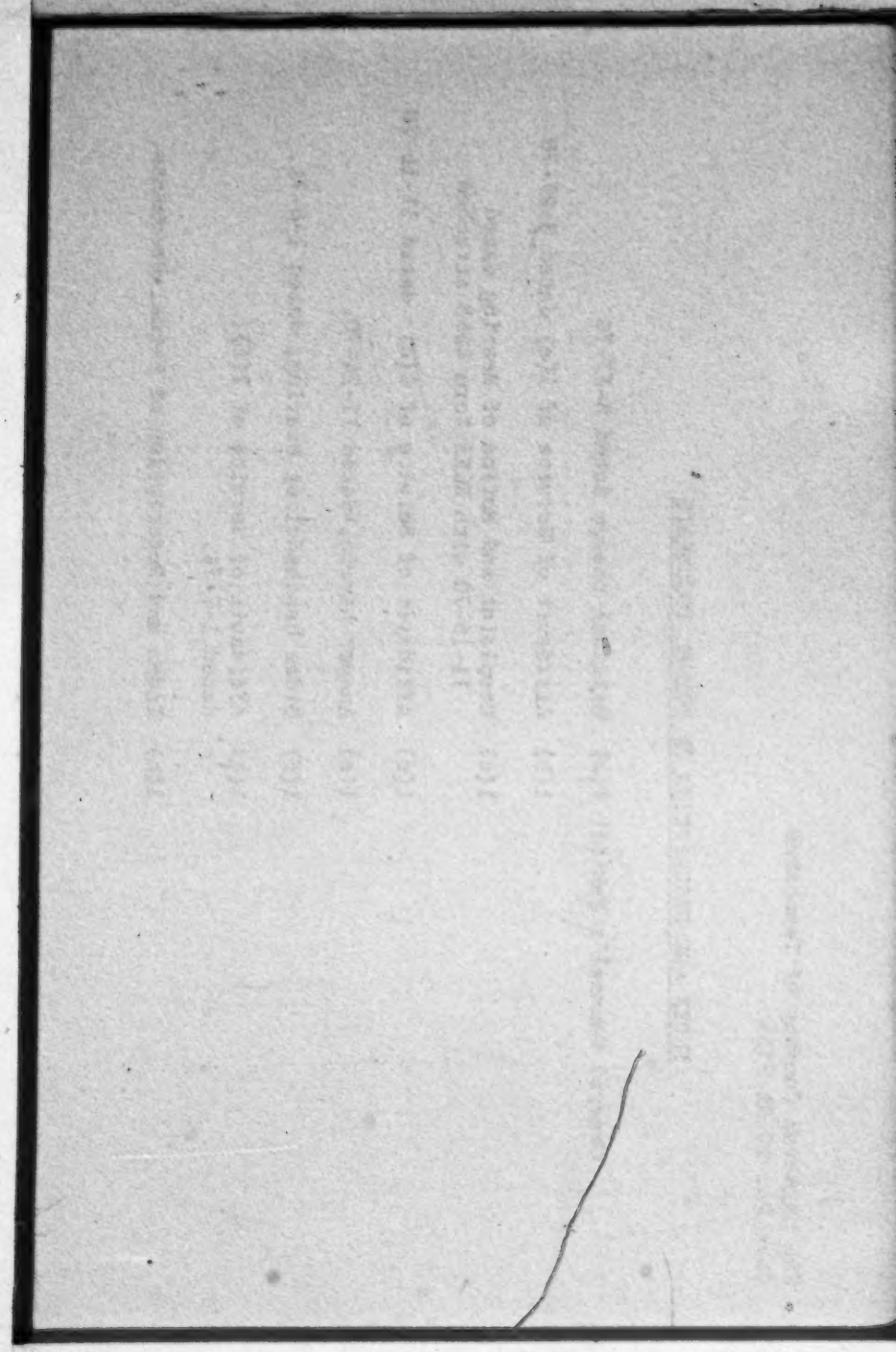
1(e) Answer herein, dated 11-24-70.

1(f) Order Rescheduling Hearing, dated 1-6-71.

1(g) Affidavit of Service of 1(f), dated 1-7-71.

1(h) Index and Description of Formal Documents.

Docket No. ... OFFICIAL EXHIBIT No. ...
Date ...
Witness ...
In the Matter of: The Magnavox Co. of Tenn.
Date of Hearing ... Reporter BF
No. Pages 1



OFFICIAL EXHIBIT NO. GENERAL COUNSEL'S NO. 2

June 25, 1970

Manager, Industrial Relations
The Magnavox Company of Tennessee
Snapps Ferry Road
Greeneville, Tennessee 37743

Re: No-solicitation and
No-distribution rule

Dear Sir:

It has been called to my attention by officers of IUE Local 796 that The Magnavox Company of Tennessee has adopted and/or enforced unlawful no-solicitation and no-distribution rules. This letter is to request that these rules be withdrawn immediately. Specifically, I request that Rule 6 of the plant rules be revoked immediately. In reference to no-solicitation, it is the position of the Union that employees should be allowed to solicit on nonwork time any place on Company property including work areas of the plant. It has also been called to my attention that the Employer is refusing to allow employees to distribute literature on Company property. It is the position of IUE that an employee should be allowed to distribute literature in nonwork areas of the Employer's property, including nonwork areas of the plant on the employee's own time.

If you are agreeable to these conditions, please advise, with a copy to Earl King, President, IUE Local 796.

Thank you for all consideration given this request.

Very truly yours,

RONALD H. JANETZKE
General Counsel

RHJ:rp
cc: W. Steinhilber
R. Fisher
B. King

G 3



OFFICES OF
SMITH, CURRIE & HANCOCK
ATTORNEYS AT LAW
1405 FULTON NATIONAL BANK BUILDING
ATLANTA, GEORGIA 30303

July 16, 1970

Mr. Ronald H. Janetzke
General Counsel
District Council 7
International Union of Electrical,
Radio and Machine Workers, AFL-CIO, CLC
3461 Office Park Drive
Dayton, Ohio 45439

Re: Magnavox Company of Tennessee
No-Distribution Rule

Dear Mr. Janetzke:

Your letter dated June 25, 1970, to the Industrial Relations Manager, Magnavox Company of Tennessee, Greeneville, Tennessee, has been referred to me for reply.

As to solicitations, the Company does allow employees to solicit during non-work time in both non-work and work areas of the plant. As to distribution of literature, the Company by the collective bargaining agreement has the right to make rules and regulations. The only limitation to this right is that such rules will not be unfair or of a discriminatory nature. (Article XII, Paragraph 3, Page 59 of the Collective Bargaining Agreement) As part of this right, the Company formulated the no-solicitation rule which prohibits the distribution of literature on Company property. We feel this rule is neither unfair nor discriminatory in nature and that the union as part of the collective bargaining process has waived its right to distribute literature on Company property. Further, by contract a bulletin board is provided by the Company exclusively for posting union notices. The Company further provides the union with current lists of the names and addresses of its employees so the union has the ability to send literature or material to the employee's home. Of course, the union has contact with its employees through union meetings and, as the union has always done in the past, the union can make pass-outs of literature

Docket No. 5-CA-5334 OFFICIAL EXHIBIT No. General Counsel's # 3
Identified ✓
Received ✓
Rejected
In the matter of The Magnavox Co. of Tenn.
Date 7-27-71 Witness Reporter RH
Ex. Page 2

at the entrance to the Company's property. The Company believes that these avenues of communication of employees are more than adequate and have been accepted by the union by contract and past practice; therefore, the Company does not contemplate revocation of its no-distribution rule at this time.

Very truly yours,

SMITH, CURRIE & HANCOCK

George K. McPherson, Jr.

GKM/nc

cc: Mr. Byron D. Sites

OFFICIAL EXHIBIT NO. GENERAL COUNSEL'S NO. 4

August 24, 1970

George K. McPherson, Jr., Esq.
Smith, Currie & Hancock
1405 Fulton National Bank Building
Atlanta, Georgia 30303

Re: The Magnavox Company of Tennessee
No-Distribution Rule

Dear Mr. McPherson:

Please find enclosed an 8(a)(1) charge which I have filed with the National Labor Relations Board, Region 10, concerning what IUE contends is an unlawful distribution rule. In view of your letter of July 16, 1970, I wish to restate the position of the IUE and its Local 796. We are no longer demanding that the Company revoke its no-solicitation rule, as the no-solicitation rule is lawful on its face, and you represent that the rule does not prohibit solicitation on Company property on the employee's own time. What IUE does seek is the agreement of Magnavox that it will no longer apply its no-solicitation rule so as to prohibit distribution of literature on all Company property. As I stated before, it is the position of IUE and its Local 796 that it has the right to distribute literature in nonwork areas of the Employer's property on the employee's own time. With the Employer's agreement that IUE Local 796 shall have the right to distribute literature in nonwork areas of the Employer's property on the employee's own time, we will immediately withdraw the aforementioned unfair labor practice charge. I urge you to give this matter serious consideration.

Very truly yours,

RONALD H. JANETZKE
General Counsel

RHJ/mtp/ope333
Enclosure
cc: Wesley H. Steinhilber
Richards Fisher
Earl King—Pres. 796
NLRB Region 10

OFFICIAL EXHIBIT NO. GENERAL COUNSEL'S NO. 5

# AGREEMENT

BETWEEN

## MAGNAVOX COMPANY OF TENNESSEE
Greeneville, Tennessee

—and—

## LOCAL 796
of the
INTERNATIONAL UNION OF ELECTRICAL
RADIO AND MACHINE WORKERS,
I.U.E.-A.F.L.-C.I.O.-C.L.C.

July 1, 1968

* * * *

## ARTICLE XII

GENERAL

1. The Company will provide one (1) bulletin board in Plant #1 (if bargaining unit employees are regularly assigned there), two (2) bulletin boards in Plant #2 and six (6) bulletin boards in Plant #3 which will be used exclusively for the posting of Union notices. Such notices must be approved by the Manager of Industrial Relations or his designated representative and will be placed on the board by the Personnel Department. It is understood that such notices will be automatically approved unless they are of a controversial nature. These bulletin boards will be labeled "Local 796, IUE-AFL-CIO-CLC".

* * * *

3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement.

* * * *

9. The parties agree that memoranda and supplementary agreements predating the signing of this Agreement shall not be binding on the parties unless resigned and redated to conform to the effective dates of this Agreement.

10. It is recognized by the parties that The Magnavox Company of Tennessee is a day work shop and consistent with this, the principle of a fair day's work for a fair day's pay is recognized by both parties to this contract. It is further recognized by the parties that in establishing time values and in measuring a fair day's work the Company will adhere to this principle.

(a) The institution of new occupations, changes in occupation elements, the establishment of standard hours and the time they shall be put into effect shall all be determined by the Company. If an employee feels that the workload is unfair or inequitable, the employee may file a grievance as provided for in the grievance procedure and it shall be processed as herein provided, except that at the first step of the procedure a Company engineer will review the date relevant to the dispute with the employee, a local union official designated to handle such disputes, and the foreman.

(b) The designated union official shall have made available all data pertaining to the dispute for use within the Industrial * * *

* * * *

OFFICIAL EXHIBIT No. GENERAL COUNSEL'S No. 6

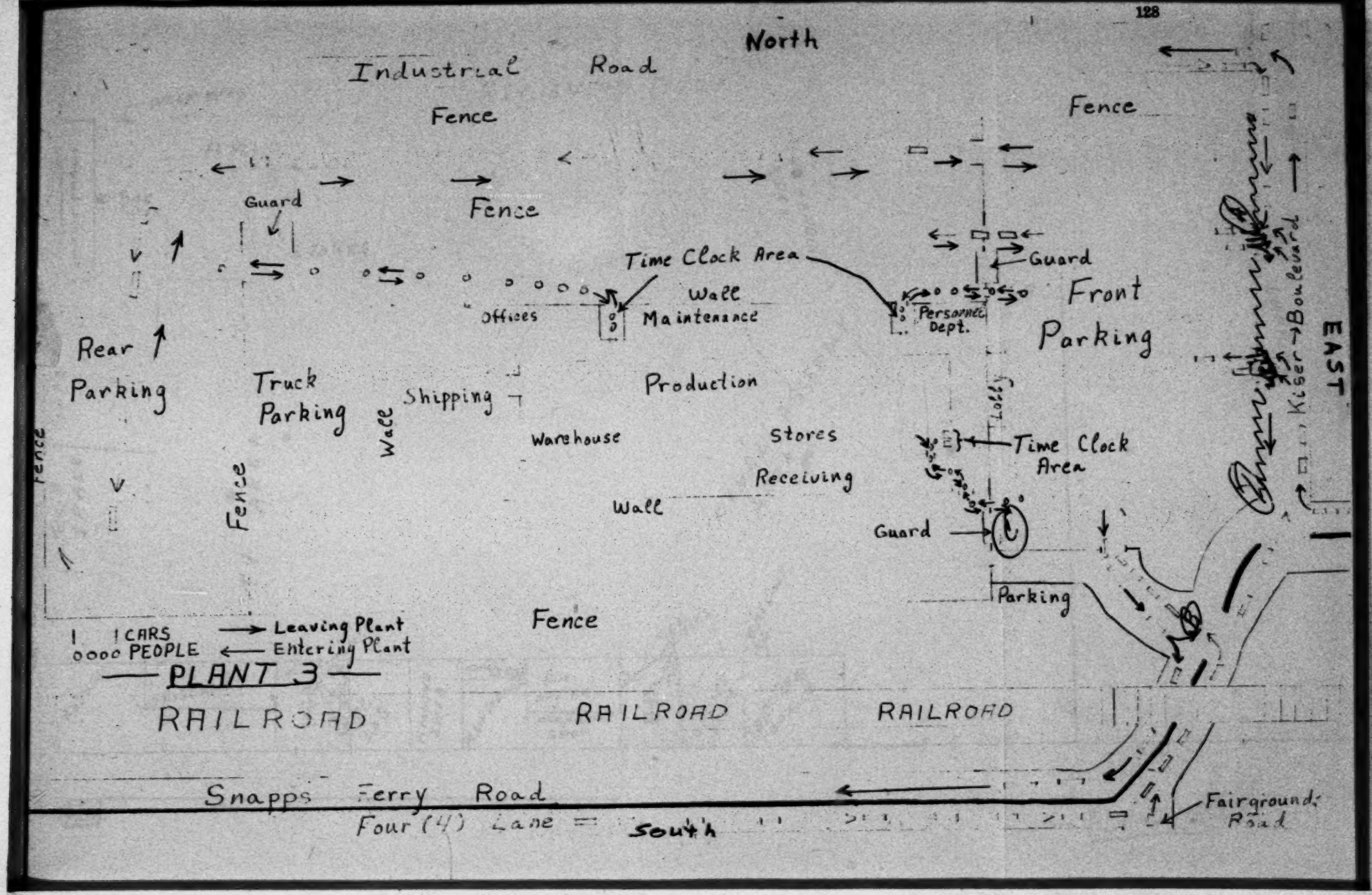
## PLANT RULES

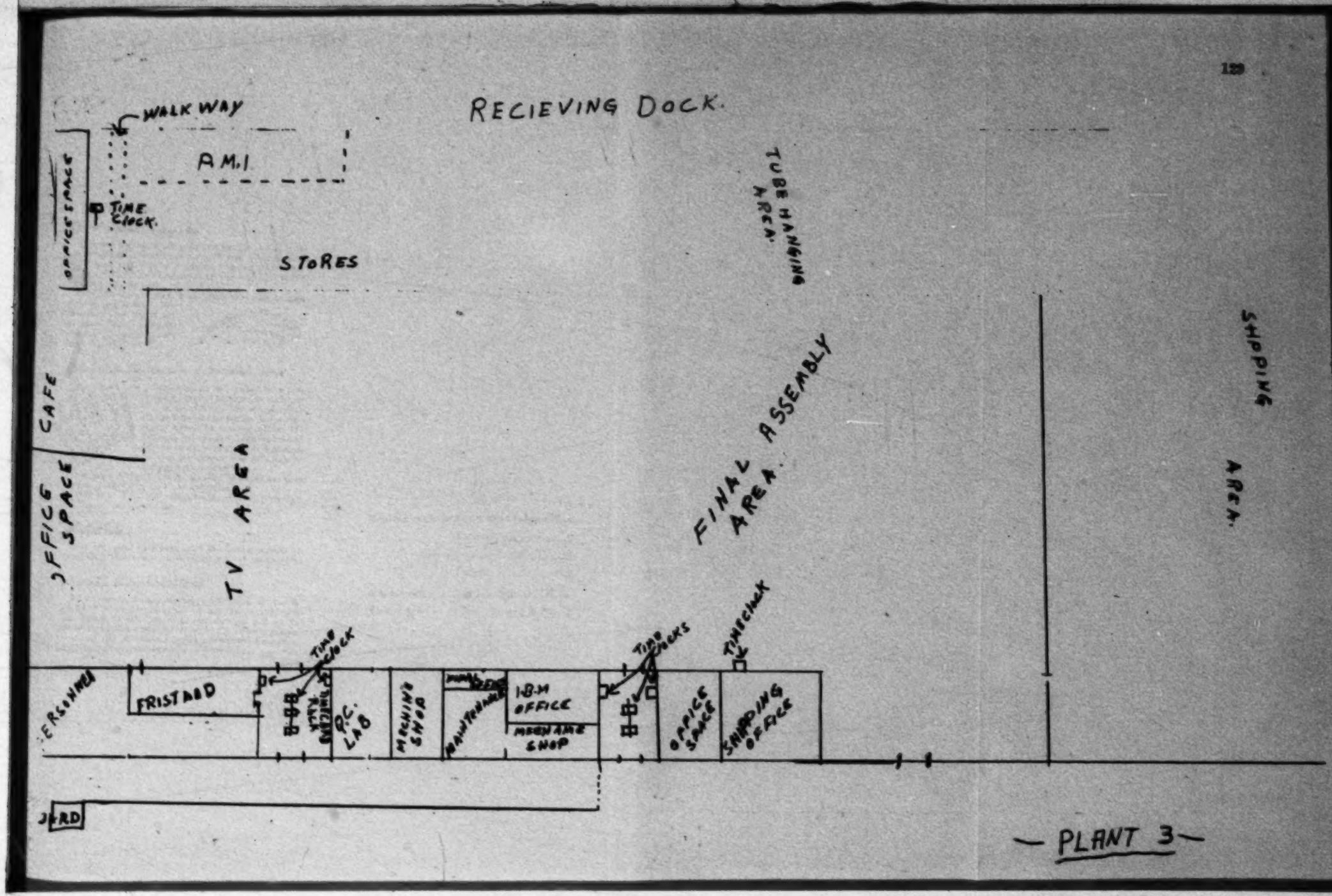
*The following will not be permitted:*

1. Reporting to work intoxicated.
2. Bringing or using alcoholic beverages or drugs on Company Property or during working hours.
3. Fighting on Company Property.
4. Stealing—either from fellow employees or from the Company.
5. Refusal to do work assigned.
6. Soliciting of any kind on Company Property during working hours.
7. Gambling on Company Property.
8. Disregard of the starting and quitting signals for shifts and rest periods.
9. Willful destruction or defacing of Company Property.
10. Unexcused absence of three days or persistent absenteeism.
11. Vulgar and/or profane language.
12. Poor quality of work or production or interfering with work of other employees.
13. Failure to report to Foreman any accident.
14. Countermanding instructions of supervisor.
15. Horseplay.
16. Disobeying safety regulations.
17. Punching another employee's time card.
18. Leaving Company Property during working hours without permission.
19. Intentionally reporting incorrect production.

*These rules are subject to change at any time as required. Such changes will be posted for information of all employees.*

THE MAGNAVOX COMPANY OF TENNESSEE


North
Industrial Road
Fence
Fence
Guard
Fence
Time Clock Area
Wall
Maintenance
Offices
Guard
Personnel Dept.
Front Parking
EAST
Kiser Boulevard
Rear Parking
Truck Parking
Shipping
Production
Wall
Warehouse
Stores
Receiving
Wall
Time Clock Area
Guard
Parking
Fence
Fence
Fence
CARS
PEOPLE
Leaving Plant
Entering Plant
PLANT 3
RAILROAD
RAILROAD
RAILROAD
Snapps Ferry Road
Four (4) Lane
South
Fairground Road


RECIEVING DOCK.
WALK WAY
A.M.I
TIME CLOCK.
OFFICE SPACE
STORES
CAFE
OFFICE SPACE
TV AREA
FINAL ASSEMBLY AREA.
TUBE HANGING AREA.
SHOPING AREA.
TIME CLOCK
TIME CLOCK
TIME CLOCK
TIME CLOCK
ERSONNEL
FRISTARD
P.C. LAB
MECHINE SHOP
I.B.M OFFICE
MECHANIC SHOP
OFFICE SPACE
SHIPPING OFFICE
ERD
PLANT 3

## Good Housekeeping

One sure indication of a good and efficient worker is the condition and appearance of his work area. Orderliness in your work area reduces accidents, improves health conditions, reduces the possibilities of fires and adds to the efficiency of your work.

We have many visitors in the plant from time to time. A neat and orderly plant impresses these people and is good Public Relations for our Company. Let's keep it clean.

## Group Life Insurance and Hospitalization

The Company has worked out a plan with the Lincoln National Life Insurance Co., which provides Life and Hospitalization Insurance for you and hospitalization protection for your dependents. The Company has assumed a large portion of the cost of this plan so that it is possible for each employee to take advantage of the protection offered.

Insurance, of course, can be cancelled by you at any time by written notice to the Personnel Office.

Your share of the Insurance premiums is paid for through the Payroll Deduction Plan.

## Handbills

You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property.

## Health Examinations

All employees, before becoming employed by Magnavox, are asked to take a health examination, at Company expense. The reason for this is to make sure that you will not be placed on jobs for which you are physically unable to handle. You may also be required to take other physical examinations should your job assignment or general health require it.



Docket No. [illegible] Office Exhibit No. [illegible]

Disposition: Identified ✓ / Rejected ✓ / Withdrawn

In the matter of The Magnavox Co. of Tenn.

Date 3-9-71 Witness [illegible] Reporter [illegible]

No. [illegible]

RES #2

## ARTICLE XII

### General

1. The Company will provide a Bulletin Board in Plant I and a Bulletin Board in Plant II each of which will be used exclusively for the posting of Union notices. Such notices must be approved by the Director of Industrial Relations or his designated representative and will be placed on the boards by the Personnel Department.

2. The Company will provide two (2) rest periods during the course of each shift. The first period will be provided during the first four hours of the shift, and will be of eight (8) minute duration. The second period will be during the last four hours of the shift and will be of seven (7) minute duration. The Company reserves the right to determine the time when such rest periods are allowed.

3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be of a discriminatory nature.

4. In the interest of protecting the health of its employees, the Company may, when it is deemed necessary, require Physical Examinations of any employee by the Company Doctor. Such examinations will in all cases be at Company expense.

5. To insure all employees an opportunity to apply for and give consideration on jobs in higher classifications the following procedure will be followed:

a. When all employees holding seniority on any upgraded job have been returned to such job, and additional

REVISED - March 8, 1955

ARTICLE XII

General

1. The Company will provide a Bulletin Board in Plant I and a Bulletin Board in Plant II each of which will be used exclusively for the posting of Union notices. Such notices must be approved by the Director of Industrial Relations or his designated representative and will be placed on the boards by the Personnel Department. It is understood that such notices will be automatically approved unless they are of a controversial nature. These Bulletin Boards will be labeled "Local 796, IUE-CIO".

2. The Company will provide two (2) rest periods during the course of each shift. The first period will be provided during the first four hours of the shift, and will be of ten (10) minute duration. The second period will be during the last four hours of the shift and will be of ten (10) minute duration. The Company reserves the right to determine the time when such rest periods are allowed.

3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature.

4. In the interest of protecting the health of its employees, the Company may, when it is deemed necessary, require Physical Examinations of any employee by the Company Doctor. Such examinations will in all cases be at Company expense. In the event of a dispute arising as a result of such examination, the dispute shall be subject to the grievance and arbitration procedure.

5. The Union and the Company agree to share equally the cost of printing a sufficient supply of copies of this contract to make them available to all employees. In addition to the contract the booklets may also include the Constitution of the local Union, and a listing of the current officers of the Union.

* (If union prefers that we pay full cost first year and they will share cost in future years.
Company offered to pay in full initially and bill them later in year for their share when they had budgeted a saving.

OFFICIAL EXHIBIT No. RESP. No. 4

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS
AFL-CIO Local No. 796

[SEAL]

Phone 6392
P. O. Box 642

GREENEVILLE, TENN.

March 15, 1956

Mr. Byron D. Sites
Dir. Industrial Relations
The Magnavox Co. of Tennessee
Greeneville, Tennessee

Dear Mr. Sites:

This letter is in confirmation of our telephone conversation of this morning.

It has been called to our attention that on several occasions handbills have been distributed in the plant by the "Committee for Independent Action."

By the same token, yesterday employees distributing our handbill have been denied this right. Yesterday they were driven off company property by one of your plant guards.

Please consider this letter a request that our members be allowed an opportunity to distribute handbills in the plant as has our opposition.

Yours truly,

/s/ Edward F. Lingo
EDWARD F. LINGO

EFL/erm
CC: National Labor Relations Board
Region 10 Peachtree-Seventh Bldg.
Atlanta, Georgia

OFFICIAL EXHIBIT NO. RESP. NO. 5

March 15, 1956

Mr. Edward F. Lingo
AFL-CIO Local No. 796
P. O. Box 642
Greeneville, Tennessee

Dear Mr. Lingo:

In reference to your letter of March 15, any action by any employee in distributing hand bills on Company property was strictly without authorization and in violation of Company rules. Various steps have been taken to prevent such incidents and the following letter today is being addressed to all of our supervision in a further effort to control the matter.

"In this period proceding the election we are faced with the problem of maintaining normal work conditions. It has been called to my attention that people have been bringing in various types of propaganda material and distributing it inside the plant. This is a violation of our rules and must be stopped immediately. If you find any employee engaging in this practice order him to cease immediately and if he fails to abide by your instructions take him to the Personnel Office for disposition of the matter."

We feel that it is improper to permit this type of campaigning within the plant by either party and therefore must refuse your request to permit such distribution.

Yours very truly,

THE MAGNAVOX COMPANY OF TENNESSEE
B. D. SITES
Director of Industrial Relations

BDS:pep
cc: National Labor Relations Board
50 Seventh Street, Northeast
Atlanta 23, Georgia

OFFICIAL EXHIBIT NO. RESP. No. 6

# AGREEMENT

BETWEEN

MAGNAVOX COMPANY OF TENNESSEE
Greeneville, Tennessee

AND

LOCAL 796
OF THE
INTERNATIONAL UNION OF
ELECTRICAL RADIO AND MACHINE
WORKERS, I.U.E.-C.I.O.

May 1, 1955

* * * *

## ARTICLE I—

### UNION RECOGNITION

Whereas the majority of the eligible employees (NLRB Case No. 10-RC-2882) have designated the Union as their sole and exclusive collective bargaining agency and whereas the Union has been so designated and certified by the National Labor Relations Board on December 23, 1954, the Company accords them such recognition for all those employees, but only those employees deemed eligible by declaration of the board in its certification.

* * * *

## ARTICLE XII

### GENERAL

1. The Company will provide a Bulletin Board in Plant I and a Bulletin Board in Plant II each of which will be used exclusively for the posting of Union Notices. Such notices must be approved by the Director of In-

dustrial Relations or his designated representative and will be placed on the boards by the Personnel Department. It is understood that such notices will be automatically approved unless they are of a controversial nature. These Bulletin Boards will be labeled "Local 796, IUE-CIO."

* * * *

3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature.

* * * *

## Plant Rules

The man who said, "Rules are made to be broken," was obviously a rule breaker, or he wouldn't have made such an untrue statement. Rules are made to be followed and observed, not broken. They are usually made only after long study and often after many sad experiences.

Rules at Magnavox are few, fair, and reasonable. We are expected to follow them. Violation of the following may lead to disciplinary action and possible discharge.

1. Reporting to work intoxicated.
2. Bringing or using alcoholic beverages or drugs on Company Property or during working hours.
3. Fighting on Company Property.
4. Stealing—either from fellow employees or from the Company.
5. Refusal to do work assigned.
6. Soliciting of any kind on Company Property during working hours.
7. Gambling on Company Property.
8. Disregard of the warning and posting signals for shifts and rest periods.
9. Willful destruction or defacing of Company Property.
10. Unexcused absence exceeding three days or persistent absenteeism.
11. Vulgar and/or profane language.
12. Poor quality of work or production or interfering with work of other employees.
13. Failure to report to Personnel any accident.
14. Countermanding instructions of supervisor.
15. Horseplay.
16. Disobeying safety regulations.
17. Punching another employee's time card.
18. Leaving Company Property during working hours without permission.
19. Intentionally reporting incorrect production.

## Pregnancy

In case of pregnancy you will be given a leave of absence providing you have worked six continuous months for the Company. The leave may not extend beyond ninety days after the birth of the child. Before returning to work you will be asked to present a doctor's release. If you have been granted pregnancy leave and return within the specified period, your seniority is not effected.



Docket No. [illegible] JUDICIAL COURT No. [illegible]

[illegible] Plaintiff ✓
[illegible] Defendant ✓
[illegible] Intervenor

In the [illegible] Court of Texas

[illegible] Term

No. Page /

## RECEIPT

I hereby sign and acknowledge receipt of booklet entitled

"YOU AND YOUR COMPANY"

and agree to study its contents carefully and abide by all the rules and regulations contained therein.

SIGNATURE Billy Kinney

CLOCK No. 684

DATE 7.22.53

Docket No. [illegible] DIRECTIONAL EXHIBIT No. Page No. 1-1

Plaintiff's Exhibit [illegible]

In the matter of The Plaintiffs Co. of Texas

Date 2-9-54 Witness Kennedy Reporter D.H.

No. Pages 1

# LOCAL 796 IUE AFL-CIO NEWS

VOL. 1, NO. 7 — 203 S. MAIN STREET—GREENEVILLE, TENNESSEE — PHONE 6362 — MARCH 20, 1956


UNION PROTECTION PAYS OFF FOR MAGNAVOX WORKERS!

# UNION WINS JOB BACK FOR BOBBY JAYNES

## ALSO OTHER IMPORTANT ARBITRATION VICTORIES

Bobby Jaynes has his job back at the Cabinet Plant....THANKS TO HIS UNION!

The Company discharged Bobby claiming "excessive" absenteeism.

Our Union argued that Bobby's discharge by the Company was without just cause. The case went to arbitration.

Last Saturday our Union received word that the arbitrator had upheld the Union's argument and ordered Magnavox to return Bobby to work.

This is just one of six of nine questions submitted to arbitration which our Union won. the decisions received Saturday show. The cases were heard by Arbitrator J. Fred Holly of Knoxville on Feb.7 and 8.

### "QUALIFIED" DOES NOT MEAN WHO CAN TURN OUT MOST WORK

Supervision in the Repair Department decided to send an employee home on "temporary layoff" because of lack of work.

The supervisor sent a senior employee home and kept a junior employee because he felt the senior employee would be "somewhat slower" and therefore not "qualified."

The employee filed a grievance that the Company had discriminated against him and had violated seniority.

The Union argued that in order to be a "qualified employee" a worker DOES NOT have to be a speed-up artist who can out-run and out-jump other employees; that the plant cannot be run like a "race track."

The arbitrator ruled that "discrimination was involved" when the Company replaced the senior man with the junior employee. The arbitrator ruled that sending the senior employee home because the supervisor thought he would be "somewhat slower" was "an improper reason for ignoring seniority. The contract does not hold that a qualified employee is the one who turns out the most work."

The arbitrator ruled the senior employee was "qualified by prior experience and by the word of his supervisor to work on the set in question" and was entitled to the pay lost.

This ruling will be helpful to hundreds of employees where the Company discriminates against them on the grounds that they are "somewhat slower" than other workers.

## This Is Way It Used To Be!

## NOW If We Don't Like It We Can File A Grievance

DON'T RETURN TO THE "OLD DAYS"!

## Vote "YES" Tomorrow!

## ARBITRATOR SAYS "EXTRA PROTECTION GIVEN TO SENIORITY" BY OUR CONTRACT

In another arbitration case, the Company was ordered to pay Joe Brown and Ruby Waddell for time lost due to the Company's failure to recall them in line with seniority following vacation. The Company claimed they were not recalled in line with seniority because a "temporary layoff" affected them. The arbitrator ruled "there is no way that the delay in recall can be forced to fit" the definition of temporary layoff in the contract. Accordingly he ruled that the two employees are entitled to pay for time lost.

In addition to ruling against the Company's claim that the delay in recall was a "temporary layoff", the arbitrator pointed out that our contract "also gives protection to seniority by providing that even in case of a temporary layoff seniority shall be protected when temporary employment is available elsewhere in the plant. Therefore, it is apparent that extreme protection was given to seniority in the Labor Agreement."

As a result of the arbitrator's decision, the Company will be more careful about what it calls a "temporary layoff" in the future and will be more careful about observing seniority in temporary layoffs.

This benefits all of us.

## "AMPLE AUTHORITY" UNDER CONTRACT TO REFUSE OVERTIME, ARBITRATOR RULES

Another arbitration case won by our Union was for Martin M. Smith, who had been discharged by the Company for refusing to work overtime on an upgraded job. After the Union filed a grievance, the discharge was changed to a disciplinary layoff of five days. The question of the Company's right to lay Smith off for five days was taken by the Union to arbitration.

The Union argued that Smith could not have violated the Labor Agreement by refusing overtime work because the contract provides that "in no event shall overtime be deemed compulsory." The arbitrator upheld the Union's argument, declaring, "Mr. Smith had ample authority (under the terms of the contract) to refuse to work overtime...Accordingly, the Company erred in subjecting the aggrieved to the disciplinary layoff. Therefore, he is entitled to pay for the five day period during which he was improperly denied employment."

## SO-CALLED "COMMITTEE" BARRED BY COMPANY FROM LEAFLETING IN PLANT

"It has been brought to my attention that people have been bringing in various types of propaganda material and distributing it inside the plant. This is a violation of our rules and must be stopped immediately."

The above statement appeared in a letter from Industrial Relations Director B. D. Sites of Magnavox to Company foremen, copy of which was sent to our Union. Cause for the letter was attempts by the outside "committee for independent action" to distribute their lying literature inside our plant.

General Manager W.H. Graham announced the Company is avoiding "taking part in the (election) campaign this year."

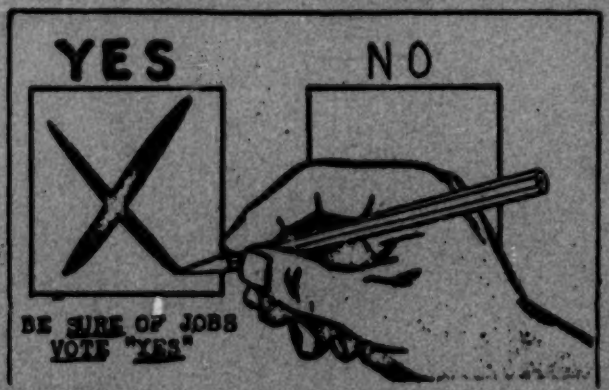
"It is your decision," Mr. Graham wrote employees.

# TOMORROW VICTORY DAY FOR ALL OF US

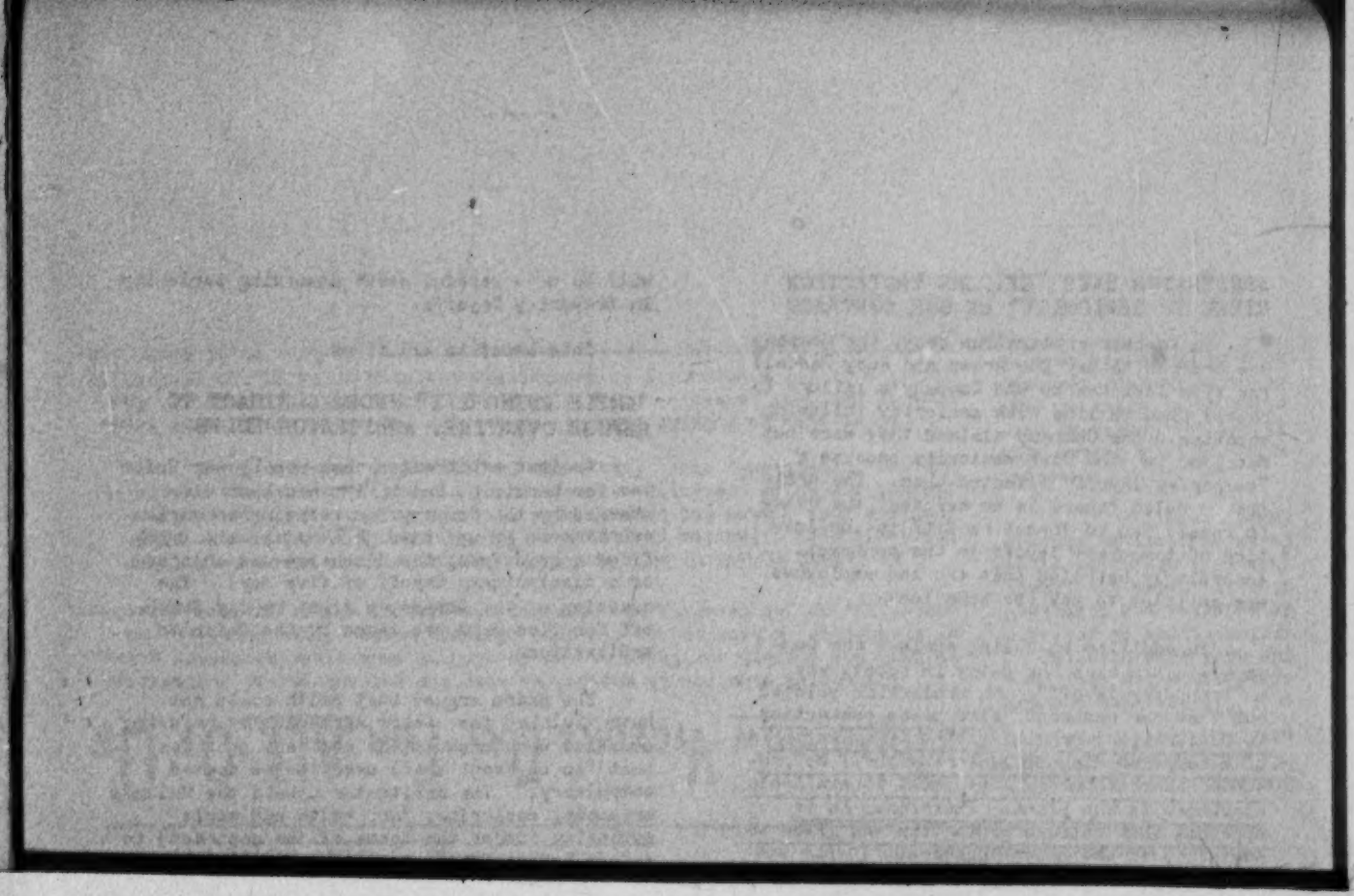
The choice tomorrow is whether we keep the guarantees and protections we have won through our Union and go forward to make other necessary gains, or whether we go back to the old days of lower wages, fewer benefits, no seniority, no job security, no right to bargain, no way to protect ourselves.

WE CANNOT AFFORD TO GO BACKWARDS! One good reason among many: The Company's huge expansion program here (3,000 jobs by summer) means many problems that Union and Company must work out together if rights of employees are to be protected -- problems of seniority, upgradings, shift changes, promotions, etc. This takes the strongest possible Union!

So we must go FORWARD UNITED! What every one of us should want tomorrow is not just to win -- BUT WIN BY THE BIGGEST MAJORITY POSSIBLE! The election is our opportunity to demonstrate the kind of UNITY AND SOLIDARITY we have built among ourselves in one short year -- unity and solidarity that will pay off in greater benefits for all of us!




Let's pile up those "YES" votes in huge numbers tomorrow so we will be prepared to say to management Thursday, "WE ARE UNITED -- LET'S START NEGOTIATING -- LET'S START WORKING ON PROBLEMS IN EXPANSION!"



UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 10-CA-8555

THE MAGNAVOX COMPANY OF TENNESSEE

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC AND ITS LOCAL 796

## MOTION TO CORRECT RECORD

Comes now Alan L. Rolnick, Counsel for General Counsel in the above-entitled matter, and files this motion to correct the official report of proceeding of hearing in the above case, conducted on February 9 and 10, 1971, at Greeneville, Tennessee, in the following respects:

| *Page* | *Line* | *Reads* | *Should Read* |
|---|---|---|---|
| 9 | 10 | belaboring oral | the laboring oar |
| 13 | 25 | Mr. _____ | Mr. McPherson |
| 14 | 24 | clocks on May 22, 1970. The Employer | clocks. On May 22, 1970 the Employer |
| 38 | 15, 17 | placed | pled |
| 56 | 21 | Cork | Quirk |
| 82 | 23 | isn't "No Legal Solicitation" | is an illegal no solicitation |
| 138 | 3, 4 | revolting, revolt | rebuttal, rebuttal |
| 141 | 3 | depletes the question | is a duplicity of questions |

Respectfully submitted,

/s/ Alan L. Rolnick
ALAN L. ROLNICK
Counsel for General Counsel

Atlanta, Georgia
March 9, 1971

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 10-CA-8555

THE MAGNAVOX COMPANY OF TENNESSEE

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AND ITS LOCAL 796

## MOTION TO CORRECT RECORD

Comes now George K. McPherson, Jr., Counsel for the Respondent in the above-entitled case, and files this motion to correct the official report of proceeding of hearing in the above case, conducted on February 9 and 10, 1971, at Greeneville, Tennessee, in the following respects:

| *PAGE* | *LINE* | |
|---|---|---|
| 28 | 1 | Delete "instead of" |
| 28 | 7 | Change "certification" to "decertification" |
| 28 | 15 | Change "certification" to "decertification" |
| 28 | 18 | Change "certification" to "decertification" |
| 35 | 7 | Change "certification" to "decertification" |
| 56 | 4 | Change "be certified" to "decertified" |
| 56 | 15 | Change "certification" to "decertification" |
| 57 | 22 | Which now reads "employee rights, oust and certified" change to read "employees' rights to oust and decertify." |
| 58 | 8&9 | Which now reads "it might be necessary" change to read "it is not necessary." |

Respectfully submitted,

/s/ George K. McPherson, Jr.
GEORGE K. MCPHERSON, JR.
Counsel for Respondent

Atlanta, Georgia
March 11, 1971

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 10-CA-8555

THE MAGNAVOX COMPANY OF TENNESSEE
AND
*Respondent* [1]

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL 796
*Charging Party* [2]

## CHARGING PARTY'S EXCEPTIONS TO TRIAL EXAMINER'S DECISION

The Charging Party excepts to the following findings of fact by the Trial Examiner:

1. Omission of certain relevant facts from the findings of fact.
2. Page 2, Lines 43-44; Page 3, Lines 1-6; Page 7, Lines 47-50: That Respondent treated the statement in its employee handbook as a rule.
3. Page 6, Lines 1-4: That Respondent had uniformly denied requests by organizations and individuals to distribute literature on Company property.
4. Page 6, Lines 45-47: Mailing of leaflets and notices to members costs approximately $400.00.

The Charging Party excepts to the following conclusional findings:

5. Page 7, Lines 15-19: The Respondent considered its no-distribution request in its employee handbook to be a no-distribution rule.
6. Page 7, Line 48: That Respondent's contention of waiver has merit and should be sustained.
7. Page 8, Lines 1-4: The Union's agreement to the management-prerogative clause incorporated all existing rules into the contract "by implication."
8. Page 8, Lines 9-18: Finding that the Union's

[1] Hereafter called Respondent or Magnavox.

[2] Hereinafter called Union, IUE or Charging Party.

contractual right to use bulletin boards in Respondent's plant was a *"quid pro quo* for the Union's acceptance of the Respondent's right to prohibit distribution of union literature on company property."

9. Page 8, Lines 42-43: Finding that the parties consistently interpreted the contract as prohibiting distribution of union literature on Company property.
10. Page 9, Lines 5-7: That Respondent has not discriminatorily enforced its no-distribution rule against the Union.
11. Page 9, Line 35; Page 10, Line 1: That it would be appropriate to recommend dismissal of the complaint except for Respondent's non-distribution rule's effect upon the employees in the event they wish to campaign against IUE.

The Charging Party excepts to the following recommended order:

12. Page 12, Lines 18-25: To that part of the cease and desist order that prohibits employees from distributing literature on behalf of the IUE in nonworking areas on nonworking time.
13. Notice to Employees: To that part of the notice to employees that prohibits employees from distributing literature on behalf of the IUE in nonworking areas on nonworking time.

Dated at Kettering, Ohio, this 28th day of May, 1971.

Respectfully submitted,

/s/ Ronald H. Janetzke
RONALD H. JANETZKE
General Counsel
District Council 7
International Union of Electrical,
Radio and Machine Workers,
AFL-CIO-CLC
3461 Office Park Drive
Kettering, Ohio 45439
Telephone: (513) 294-1491

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C.

Case No. 10-CA-8555

IN THE MATTER OF:
THE MAGNAVOX COMPANY OF TENNESSEE
—and—
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL 796

# RESPONDENT'S CROSS EXCEPTIONS TO CERTAIN PORTIONS OF THE TRIAL EXAMINER'S DECISION AND RECOMMENDED ORDER

COMES NOW THE MAGNAVOX COMPANY OF TENNESSEE, Respondent in the above-styled case, and files these, its Exceptions to Certain Portions of the Trial Examiner's Decision and Recommended Order in this case.

1.

Respondent excepts to the Trial Examiner's finding and conclusion that Respondent's no-distribution rule prohibiting all distribution of literature on Company property violated Section 8(a)(1) of the National Labor Relations Act, as amended, to the extent said rule proscribed distribution by employees on behalf of any labor organization other than the incumbent (TXD, p. 12,11. 1-3) on the grounds that:

(a) Such finding is based upon an improper conclusion drawn from the evidence.
(b) Such finding is based upon an improper conclusion of law.

2.

Respondent excepts to the Trial Examiner's Recommended Order insofar as it would require Respondent to:

> [c]ease and desist from maintaining, giving effect to or enforcing any rule which prohibits any employee from distributing literature in behalf of any labor organization other than International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 796, where the activity occurs in nonworking areas on nonworking time (TXD, p. 12, 11. 15-25)

on the ground that such Order is based upon an improper conclusion of law that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended.

3.

Respondent excepts to the Trial Examiner's Recommended Order insofar as it would require Respondent to post the "Notice to Employees" designated as "Appendix" (TXD, p. 12, 11. 27-35, p. 13, 11. 1-4) on the ground that such Order is based upon an improper conclusion of law that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended.

WHEREFORE, Respondent, The Magnavox Company of Tennessee, prays that the Trial Examiner's Decision and Recommended Order be modified as to those matters excepted to and that the Board enter an Order dismissing the Complaint in this case in its entirety.

Respectfully submitted,

SMITH, CURRIE & HANCOCK

By:_____
GEORGE K. MCPHERSON, JR.

By:_____
JAMES ALLAN SMITH

1405 Fulton National Bank Bldg.
Atlanta, Georgia 30303
Telephone: 404/521-3800

Greeneville, Tenn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 10-CA-8555

THE MAGNAVOX COMPANY OF TENNESSEE

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL 796

## ORDER CORRECTING DECISION AND ORDER

On January 31, 1972, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by striking the second paragraph from the first page of the Decision.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., February 9, 1972.

By direction of the Board:

GEORGE A. LEET

Associate Executive Secretary

[1] 195 NLRB No. 40.

SUPREME COURT OF THE UNITED STATES

No. 72-1637

NATIONAL LABOR RELATIONS BOARD,
*Petitioner*,

v.

THE MAGNAVOX COMPANY OF TENNESSEE

ORDER ALLOWING CERTIORARI—Filed October 9, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 528020 122

SUPREME COURT, U. S.

NOV 28 1973

MICHAEL RODAK, JR., CLERK

No. 72-1637

# In the Supreme Court of the United States

OCTOBER TERM, 1973

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

THE MAGNAVOX COMPANY OF TENNESSEE, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

---

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

PETER G. NASH,
*General Counsel,*
JOHN S. IRVING,
*Deputy General Counsel,*
PATRICK HARDIN,
*Associate General Counsel,*
NORTON J. COMEN,
*Deputy Associate General Counsel,*
MARION GRIFFIN,
*Attorney,*
*National Labor Relations Board,*
*Washington, D.C. 20570.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| A. The Board's decision | 2 |
| B. The court of appeals decision | 6 |
| Summary of argument | 7 |
| Argument | 10 |
| The Board properly concluded that the collective bargaining representative may not waive the employees' right to distribute union literature during non-working time in non-working areas of the plant | 10 |
| Conclusion | 21 |


## CITATIONS


Cases:

| | |
|---|---|
| *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 | 6, 16 |
| *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 | 12 |
| *Gale Products*, 142 NLRB 1246, enforcement denied, 337 F. 2d 390 | 5, 16 |
| *General Motors Corp.*, 147 NLRB 509 | 16 |
| *Great Lakes Carbon Corp.* v. *National Labor Relations Board*, 360 F. 2d 19 | 19 |
| *H. K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99 | 18 |
| *Int'l Assoc. of Machinists* v. *National Labor Relations Board*, 415 F. 2d 113 | 17 |




327-174—72——1

Cases—Continued


| | Page |
|---|---|
| *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332 | 11 |
| *McDonnell Douglas Corp.* v. *National Labor Relations Board*, 472 F. 2d 539 | 18 |
| *Mason and Hanger-Silas Mason Co.* v. *National Labor Relations Board*, 405 F. 2d 1 | 20 |
| *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270 | 8, 11, 12, 13 |
| *Meat and Highway Drivers Local 710* v. *National Labor Relations Board*, 335 F. 2d 709 | 19 |
| *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 | 17 |
| *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221 | 14, 20 |
| *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, certiorari denied, 350 U.S. 836 | 11 |
| *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702 | 8, 12, 13, 14, 17 |
| *National Labor Relations Board* v. *Rockaway News Co.*, 345 U.S. 71 | 19 |
| *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87 | 20 |
| *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F. 2d 128, certiorari denied, 376 U.S. 951 | 17–18 |
| *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 | 7, 10 |
| *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 | 12 |
| *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 | 18 |
| *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 | 12 |
| *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, certiorari denied, 376 U.S. 971 | 11 |
| *Truck Drivers and Helpers, Local 568* v. *National Labor Relations Board*, 379 F. 2d 137 | 12 |

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):


| | Page |
|---|---|
| Section 1, 29 U.S.C. 151 | 9, 11, 15 |
| Section 7, 29 U.S.C. 157 | 2, 5, 6, 7, 9, 10 |
| Section 8(a)(1), 29 U.S.C. 158(a)(1) | 2, 5, 10 |
| Section 9(a), 29 U.S.C. 159(a) | 11 |

# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1637

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

THE MAGNAVOX COMPANY OF TENNESSEE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-15)[1] is reported at 474 F. 2d 1269. The decision and order of the National Labor Relations Board (Pet. App. 18-49) are reported at 195 NLRB 265.

### JURISDICTION

The judgment of the court of appeals was entered on March 8, 1973. The petition for a writ of certiorari was filed on June 6, 1973, and was granted on October 9, 1973 (A. 147). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix of the petition for certiorari. "A." refers to the separate appendix to the briefs.

## QUESTION PRESENTED

Whether a provision in a collective bargaining agreement that bars the distribution of union literature during non-working hours in non-working areas of the plant impermissibly abridges the employees' right to make such distribution, which is safeguarded by Section 7 of the National Labor Relations Act.

## STATUTE INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provides, in pertinent part:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Section 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.

## STATEMENT

### A. THE BOARD'S DECISION

The International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC and its Local 796 first became the collective bargaining representative of the Company's employees in December 1954 (Pet. App. 32; A. 11–12, 135). At that time, the Company was main-

taining a rule prohibiting employees from distributing literature on all Company property, including parking lots and other non-work areas (Pet. App. 19, 32–33; A. 12–13, 30–31).[2]

In the initial contract negotiations, the Union proposed that the plant rules should be made a part of the contract. The Company opposed this proposal as a limitation on its ability to promulgate rules, and the Union ultimately agreed to a contract provision authorizing the Company to issue rules for the "maintenance of orderly conditions on plant property," provided the rules were not "unfair" or "discriminatory" (Pet. App. 33–34; A. 14, 16–17, 23, 135a). The contract also provided that bulletin boards would be made available for the posting of union notices, subject to the Company's right to reject "controversial" notices (Pet. App. 34; A. 23–24, 135–135a).

All subsequent contracts have contained similar provisions (Pet. App. 19–20, 34–35; A. 25–30, 125). The Company has continued throughout this 16-year period to maintain and enforce its rule prohibiting employees from distributing literature in non-working areas during non-working time (Pet. App. 19–20, 36; A. 30–32, 40–42, 57–58).[3] In 1956, the Union complained to the

---

[2] The Company's employee handbook provided, "'You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property'" (Pet. App. 32); A. 13, 31, 130). Although the Company stopped distributing the handbook to employees at about the time of the Union's certification, it has continued to maintain and enforce the no-distribution rule (A. 38–39, 46–48, 127).

[3] Exceptions to the rule were made for charity drives and for the distribution of Company publications (Pet. App. 37; A. 30–32, 55–56, 58, 83–84, 91, 102).

Company that employees opposed to the Union were distributing literature urging decertification of the Union in a forthcoming election, while employees seeking to distribute a pro-union handbill had been driven off Company property by a plant guard (Pet. App. 35; A. 18, 20–21, 133). The Company replied that "* * * any action by any employee in distributing handbills on Company property was strictly without authorization and in violation of Company rules" and that supervisors would be instructed to stop employees from engaging in this practice immediately (Pet. App. 36; A. 20–22, 134).

Except for its 1956 complaint, the Union acquiesced in the no-distribution rule and distributed union literature at the entrances of the Company's property rather than on the premises (Pet. App. 36–37; A. 53–54, 56, 65, 70–73, 77–78, 81, 99–100, 103, 128). However, on May 21, 1970, the Union challenged the validity of the rule in the course of requesting permission to distribute a union leaflet at the timeclock (Pet. App. 38; A. 55).* On June 25, 1970, the Union formally requested in writing that the Company revoke its no-distribution rule to permit employee distribution in non-working areas during non-working time (Pet. App. 38; A. 121). The Company refused both requests, adhering

*The president of Local 796 testified that the Union had not previously asserted the right of employees to distribute union literature on plant premises because "[w]e knew the Company's position and we felt it was futile to say anything about it" (A. 94). He further testified that the Union challenged the no-distribution rule after it was advised at a district council meeting in the spring of 1970 that there was a legal right to engage in on-premises distribution (A. 96).

to the no-distribution rule and the contract provision authorizing it to make rules that are not unfair or discriminatory (Pet. App. 38; A. 9, 55, 122).

The Union filed charges and the Board, interpreting the collective bargaining agreement in the light of the bargaining history, found that the Union had acquiesced in the Company's no-distribution rule (Pet. App. 19–20). The Board held, however, that the right of employees, under Section 7 of the National Labor Relations Act, to select or reject a collective bargaining representative and to communicate fully with respect to that choice is not subject to waiver by the collective bargaining representative, and thus that the Company violated Section 8(a)(1) of the Act by enforcing its overly broad rule (Pet. App. 20–22). The Board followed its earlier decision in *Gale Products*,* where, balancing the interference with the employees' statutory rights against any legitimate reasons for upholding the waiver, it concluded that "an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act" (Pet. App. 21; 142 NLRB at 1249). The Board added:

> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees. * * * [*ibid.*].

---

* 142 NLRB 1246, enforcement denied, 337 F. 2d 390 (C.A. 7).

The Board declined to adopt the remedy it ordered in *Gale Products*, which would have protected only the employees' right to distribute literature other than on behalf of the incumbent bargaining representative (Pet. App. 22–23). It found no statutory basis for affording more protection to "employees who wish to exercise their Section 7 right to *reject* [rather than] * * * to *support* a union representative" (Pet. App. 23). Accordingly, the Board ordered the Company to cease and desist from maintaining or enforcing any rule that prohibits employees from distributing literature in nonworking areas during non-working time on behalf of any labor organization, relating to the selection or rejection of a bargaining representative, or relating to other matters relevant to the exercise by employees of their Section 7 rights (Pet. App. 25).

### B. THE COURT OF APPEALS DECISION

The court of appeals held that the Board's factual findings were supported by substantial evidence on the record as a whole (Pet. App. 15),[6] but adhered to its previous ruling[7] that "the bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of spe-

[6] Thus, the court rejected the Union's contention that it had not acquiesced in the Company's no-distribution rule by entering into and maintaining a contract provision authorizing the Company to issue rules and regulations while the no-distribution rule remained in effect (Pet. App. 14–15).

[7] *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 (C.A. 6).

cial circumstances not present here" (Pet. App. 15). It therefore denied enforcement of the Board's order.

## SUMMARY OF ARGUMENT

Section 7 of the Act guarantees to employees the right "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing" as well as the right "to refrain from any or all of such activities." This guarantee encompasses the right to make a free choice respecting the selection or retention of a bargaining representative, and to communicate freely concerning that choice. Because the plant is the place where employees can most readily exchange views and information about their choice of a bargaining representative, a ban on union solicitation or on the distribution of union-related literature by employees at the plant during non-working time "must be presumed to be an unreasonable impediment to self-organization" unless the employer can demonstrate that "special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801, 803–804, n. 10. The Company made no attempt to demonstrate such special circumstances justifying its blanket no-distribution rule here. Rather, the Company contended that the Union had waived the employees' Section 7 rights by acquiescing in the rule. The Board correctly rejected this contention on the ground that the rights of free choice and expression guaranteed employees in the Act outweigh any legitimate reason for uphold-

ing a waiver of those rights by the collective bargaining representative.

As the employees' representative, the Union is authorized to engage in collective bargaining on their behalf and to waive certain rights—for example, the right to strike. Such waivers rest on the "premise of fair representation" and are subject to the requirement that "the selection of the bargaining representative remains free." *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 280 (italics omitted). Since "union and employee interests are one" in the context of concerted efforts to achieve economic advantage, "it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to [the] employees." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 705 (C.A. 5).

By contrast, the rights to distribute materials and to solicit support in organizing for collective bargaining are rights that individual employees exercise in choosing whether to be represented by a union, and in re-evaluating their bargaining agent. "[T]he rationale of allowing waiver * * * disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse." *National Labor Relations Board* v. *Mid-States Metal Products, Inc., supra*, 403 F. 2d at 705. Moreover, even if it could be assumed that the

union would secure economic benefits in return for the surrender of these rights, waiver would constitute an unacceptable abridgement of the basic statutory policy of protecting employees' "full freedom of association, self-organization, and designation of representatives of their own choosing" (Section 1, 29 U.S.C. 151). Since Section 7 guarantees equally the right to select or reject a bargaining agent, the Board properly held that a contractual waiver of the right to distribute literature is invalid both as to supporters, and opponents, of the incumbent union.

There is no merit to the Company's suggestion that the Board should have balanced the availability of alternative channels of employee communication against a legitimate employer business justification for the no-distribution rule, since there is no evidence that the rule was needed to maintain production or discipline. Nor did the Board place impermissible limits on the parties' freedom of contract. Where, as here, the parties have agreed to restrict statutory rights in a manner inconsistent with employee freedom of choice, the Board may require the parties to cease enforcing the unlawful portion of their agreement. Finally, the Company incorrectly contends that this case does not involve a restriction on the employees' right to distribute literature concerning the selection or rejection of a bargaining representative because the literature to be distributed here was a union leaflet. It is undisputed that the Company's rule barred all distribution on the premises, and that the rule was consistently enforced (with rare exceptions not

relevant here). In these circumstances, it is plain that the rule would have barred the distribution of union literature relevant to the selection or rejection of a bargaining representative.

## ARGUMENT

### THE BOARD PROPERLY CONCLUDED THAT THE COLLECTIVE BARGAINING REPRESENTATIVE MAY NOT WAIVE THE EMPLOYEES' RIGHT TO DISTRIBUTE UNION LITERATURE DURING NON-WORKING TIME IN NON-WORKING AREAS OF THE PLANT

Sections 7 and 8(a)(1) of the Act guarantee employees the right to organize and bargain collectively through representatives of their own choosing, or to refrain from such activities, free from employer interference. Implicit in that guarantee is the right to select or reject a bargaining representative and to communicate freely concerning that choice. Since the plant is the "place uniquely appropriate" for the exchange of employee views and information, a ban on the distribution of union literature, or on the solicitation of union support, by employees at the plant during non-working time constitutes an interference with the employees' right to organize guaranteed by Section 7. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 801, n. 6, 803. Such a ban "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline" (*id.* at 803–804, n. 10).

There is no contention here that considerations of production or discipline make the Company's no-distribution rule necessary. The sole issue presented is whether the Board properly concluded that the statutory guarantee of employee free choice and expression prevent a legitimate waiver of those rights by the collective bargaining representative. The Board's conclusion is correct and should be upheld by this Court.

1. In furtherance of the Act's policy of "encouraging the practice and procedure of collective bargaining" (Section 1, 29 U.S.C. 151) and pursuant to the principle of "majority rule" embodied in Section 9(a) (29 U.S.C. 159(a)), the representative selected by a majority of the employees in an appropriate unit is empowered, as part of the economic bargain struck with the employer in the collective agreement, to waive certain rights which the individual employees might otherwise have. See *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332, 338–339. Thus, the union designated by employees as their agent is authorized not only to negotiate their wages and other conditions of employment, but also to waive such statutory rights as the right to strike or the right to bargain about subjects within the area of mandatory bargaining. *Mastro Plastics Corp.* v. *National Labor Relations Board,* 350 U.S. 270, 279–284; *Timken Roller Bearing Co.* v. *National Labor Relations Board,* 325 F. 2d 746, 750–751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *Item Co.,* 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836.

Waiver of these rights is permitted because they depend on collective action for their effectiveness, and the union is the arbiter of such action.* Moreover, the interests of the union and the employees in the economic arena normally coincide, and "it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 705 (C.A. 5). For example, once the union has reached agreement with the employer on wages and other employment benefits, it may appropriately waive the employees' right to strike during the term of the agreement as the *quid pro quo* for the employer's acceptance of a mandatory grievance and arbitration procedure as the mechanism for enforcing the contractual benefits provided. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455.

In *Mastro Plastics Corp.* v. *National Labor Relations Board, supra,* however, the Court emphasized that contractual waivers of the right to strike rest on the "premise of fair representation" and that such clauses promote the flow of commerce "[*p*]*rovided the selection of the bargaining representative remains free*" (350 U.S. at 280, emphasis in original). The Court, therefore, refused to interpret a union's agree-

*However, the union's bargaining authority is limited by the duty of fair representation; the union may make only rational and lawful distinctions among the employees it represents. *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 203–204; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338; *Truck Drivers and Helpers, Local 568* v. *National Labor Relations Board*, 379 F. 2d 137, 142–143 (C.A. D.C.).

ment to refrain from " 'any strike' " during the term of the contract as a waiver of the employees' right to strike "against unlawful practices destructive of the foundation on which collective bargaining must rest" (*id.* at 281). In the Court's view, "the contract, taken as a whole, deal[t] solely with the economic relationship between the employers and their employees"; it did not constitute a waiver of the right to strike against flagrant employer interference "with the expressly protected right of * * * employees to select their own bargaining representative" (*id.* at 281; 278).

Similar considerations support the Board's refusal here to uphold a contractual waiver of the employees' right to distribute literature relating to their selection or rejection of a bargaining representative. As the Fifth Circuit stated in *National Labor Relations Board* v. *Mid-States Metal Products, Inc., supra,* 403 F. 2d at 705:

> The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage. * * *

Waiver is permissible in the economic area because it can fairly be assumed that the union will not agree to waive the employees' rights without securing substantial concessions on their behalf from the employer. The Fifth Circuit noted, however, that this rationale

> * * * disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse. Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative. [*Mid-States, supra,* 403 F. 2d at 305.]

Moreover, even if the union secured some bona fide employee benefits from the employer in return for agreeing to a ban on in-plant solicitation and literature distribution, it is unlikely that those benefits could adequately compensate for the impairment of employee rights which would result from the ban. Cf. *National Labor Relations Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 231–236. The employees' right to make a free choice respecting the selection or retention of a bargaining representative can be effectively exercised only if the employees are well informed on matters relevant to that choice, and the plant is the "place uniquely appropriate" for employees to obtain this information.

The impairment of this political right of free choice resulting from a ban on in-plant union solicitation and literature distribution could not be offset by a solely

economic gain such as an increase in wage rates. Nor would a bulletin board privilege, similar to that obtained by the Union here (*supra*, p. 3), adequately substitute for in-plant union solicitation and literature distribution by the employees. An incumbent union's bulletin board could hardly be used to promote the communication of opposing views, particularly where, as here, the employer reserved the right to reject "controversial" notices (*supra*, p. 3).

2. In view of the foregoing considerations, the Board reasonably concluded that the Act's policy of protecting employees' "full freedom" in the "designation of representatives of their own choosing" (Section 1, 29 U.S.C. 151) prevents the bargaining representative from waiving the right of opposing employees to in-plant distribution of literature relevant to the replacement or rejection of that representative. Given the impropriety of permitting the incumbent representative to waive the rights of its employee opponents, the Board also reasonably concluded that it is equally improper to permit it to waive the rights of its employee supporters. Any other position would create an unfair situation in which employees opposing the incumbent representative could distribute literature within the plant attacking the incumbent, while its supporters would be prevented from responding. Accordingly, the Board correctly permitted the Union, even though it had agreed to the contract waiver originally, to challenge the validity of that waiver on behalf of all the employees whom it represented; the Board's order protects literature distribu-

tion on behalf of, or in opposition to, any labor organization (Pet. App. 25).[9]

---

[9] In concluding that the rights of supporters of the incumbent representative merit as much protection as do those of its opponents, the Board drew on the experience provided by prior litigation (Pet. App. 22–24). Thus, as initially stated in *Gale Products*, *supra*, the Board's position was that "neither an employer nor an incumbent union is entitled, absent special circumstances * * *, to freeze out another union by trenching on statutory rights of employees to engage in protected activities" (142 NLRB at 1249). Consequently, the Board set aside the contractual limitation only insofar as it prohibited the distribution of literature on behalf of a labor organization other than the contracting union (*ibid.*). However, in *General Motors Corp.*, 147 NLRB 509, Member Jenkins indicated that he would "go further and hold that such a contractual prohibition of organizational activity is also invalid as applied to employees who are members or supporters of the contracting union" (*id.* at 514, concurring and dissenting opinion). Pointing to the concern for employee organizational rights expressed in the Act, Member Jenkins stated (*ibid.*):

> These rights, in my view, are so fundamental that I am unwilling to hold that they can be waived or bargained away by a union for the employees generally or for any specific group of employees. Except where legitimate reasons for interference with those basic rights have been established—and none is present here—I think employees have, and should have, the right to assist and support labor organizations of their own choosing irrespective of whether the labor organization is an incumbent or a rival one. The purposes of the Act, in my view, are not furthered by the denial to any employees of their basic statutory rights.

The Sixth Circuit, in denying enforcement of the Board's order in *Armco Steel Corp.* v. *National Labor Relations Board*, *supra*, relied in part on the fact that (344 F. 2d at 624):

> Under Section 9 of the Act the collective bargaining representative was the exclusive representative of *all* the employees, which included dissident as well as those who were loyal to the incumbent. It was the Board who divided Arm-

3. (a) The Company contends that the Board erred in failing to consider the availability of alternative channels of employee communication in this case (opposition to certiorari pp. 9–10, 15–17). But "[n]o restriction may be placed on the employees' rights to discuss self-organization among themselves [in the plant], unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *Labor Board,* 324 U.S. 793, 803." *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 113. Here, the trial examiner found that "no evidence of necessity whatsoever has been shown" (Pet. App. 40). Accordingly, there is no occasion to balance the availability of alternative channels of communication for the employees against a legitimate employer business justification for a rule barring in-plant communication, since no such justification has been demonstrated. See *National Labor Relations Board* v. *United Aircraft*

---

co's employees into two classes and held the collective bargaining agreement invalid as to dissident and valid as to loyal employees supporting that representative. The purpose of the National Labor Relations Act is to promote industrial peace. Policy making decisions of the Board favoring employees supporting a rival union over those loyal to the incumbent would seem to us to have the opposite effect.

In *Int'l Assoc. of Machinists* v. *National Labor Relations Board,* 415 F. 2d 113, the Eighth Circuit, while agreeing with the Fifth Circuit's decision in *Mid-States Metal, supra,* that the organizational rights at issue here are too fundamental to be contracted away by the union, enlarged the Board's order to insure employees the right to distribute literature "on behalf of any labor organization or in any opposition to any labor organization" (*id.* at 116). In this case, the Board has adopted the position of Member Jenkins and of the Eighth Circuit.

*Corp.*, 324 F. 2d 128 (C.A. 2), certiorari denied, 376 U.S. 951. Cf. *McDonnell Douglas Corp.* v. *National Labor Relations Board*, 472 F. 2d 539, 545–546 (C.A. 8) (employer made "a creditable showing of special, justifying circumstances" for rule limiting off-duty employees' access to plant premises).[10]

(b) In its brief below (p. 18), the Company stressed the "extreme importance of freedom of contract and the impropriety of Board interference with that freedom," citing *H. K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99. *Porter*, however, held only that the Board did not have the power to compel an employer to agree to a substantive contractual provision about which he had unlawfully refused to bargain. The decision in *Porter* specifically recognizes that the Act imposes limits on the parties' freedom of contract. 397 U.S. at 108, n. 6. Where the parties have agreed to a provision which limits statutory rights in a manner inconsistent with employee

[10] The importance to employees of the right to communicate within the plant during non-working time becomes even more important as employees live farther from the plant, causing more automobile commuting and attendant difficulties in plant-gate distribution. See *National Labor Relations Board* v. *United Aircraft Corp.*, *supra*, 324 F. 2d at 130; Union's memorandum in support of the petition, p. 6. The evidence in this case showed that the same or similar problems made alternative methods of communication inadequate here (Pet. App. 38–39; A. 87–90, 92–94, 99–101, 103). The Company's reliance (opposition to certiorari, p. 15) on *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, is misplaced. That case merely held that in-plant distribution by employees can be restricted to non-working areas without significantly diminishing the employees' opportunity to communicate—a view followed by the Board here (Pet. App. 25).

freedom of choice, they have moved outside the area of fair exchange in collective bargaining and into direct conflict with employee freedoms and with the basic policies of the Act. In such a situation the Board may require the parties to cease enforcing the unlawful portion of their agreement.[11]

(c) Nor is there merit to the Company's contention that the reasons advanced, *supra*, pp. 10–16, for not honoring the Union's waiver were inapplicable here because "the literature to be distributed did not deal with the selection or rejection of a bargaining representative * * * but was a union leaflet" (opposition to certiorari, p. 11). The record is silent on the contents of the Union's leaflet. It is undisputed that the Company's rule barred all employee distribution of union-related literature on its premises, and that the Company has consistently maintained and enforced the rule (with exceptions not relevant here), specifically applying it in the past in an organizational campaign (*supra*, pp. 3–4). Moreover, in denying the Union's requests to revoke the rule and permit employees to distribute union literature in non-working areas on their own time, the Company did not suggest that its refusal to permit distribution of the union leaflet was based on its contents; rather it took the position that any in-plant distribution of literature

---

[11] See *National Labor Relations Board* v. *Rockaway News Co.*, 345 U.S. 71, 79; *Great Lakes Carbon Corp.* v. *National Labor Relations Board*, 360 F. 2d 19, 22 (C.A. 4); *Meat and Highway Drivers Local 710* v. *National Labor Relations Board*, 335 F. 2d 709, 717 (C.A.D.C.).

was prohibited (*supra*, pp. 4–5). In these circumstances, the rule would deter employees from distributing, and would, in fact, have been applied by the Company to bar the distribution of, all literature relevant to the selection or rejection of a bargaining representative."

In sum, the Board reasonably concluded that the employees' right to receive and communicate information necessary to the intelligent exercise of their free choice concerning a bargaining representative outweighed any legitimate reasons for permitting the incumbent representative to waive that right. In reaching a contrary conclusion, the court below thus impermissibly intruded upon the Board's function of striking a balance among "conflicting legitimate interests" which will "effectuate national labor policy." *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96; see also *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236.

---

[11] The protection afforded employees under the Board's order applies only to non-working time and only to the distribution of literature "on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees * * *, or other matters related to the exercise by employees of their Section 7 rights" (Pet. App. 25). Cf. *Mason and Hanger-Silas Mason Co.* v. *National Labor Relations Board*, 405 F. 2d 1, 5 (C.A. 5) (opposition to certiorari, pp. 10–11) (distribution of union personnel lists). Since its "holding is concerned solely with the exercise by *employees* of their Section 7 rights," the Board emphasized that "it is not to be taken as licensing in any way the distribution of institutional—as distinguished from purely organizational—literature of a labor organization which has acquiesced in an employer's promulgation or maintenance of a broad no-distribution rule" (Pet. App. 24, n. 9).

## CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to enforce the Board's order.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
JOHN S. IRVING,
*Deputy General Counsel,*
PATRICK HARDIN,
*Associate General Counsel,*
NORTON J. COMEN,
*Deputy Associate General Counsel,*
MARION GRIFFIN,
*Attorney,*
*National Labor Relations Board.*

NOVEMBER 1973.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 29 1973
MICHAEL RODAK, JR., CLERK

No. 72-1637

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, RESPONDENT

---

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D.C. 20036

RONALD H. JANETZKE
1361 Office Park Drive
Kettering, Ohio 45439

*Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Respondent*

## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement | 3 |
| Bargaining History | 3 |
| The 1956 Request to Distribute | 11 |
| Exceptions to the No-Distribution Rule | 13 |
| Allegedly Relevant Contract Provisions | 14 |
| May and June 1970 Requests to Distribute | 16 |
| The Problem of Access to the Company's Employees | 17 |
| The Board's Decision and Order | 18 |
| The Decision of the Court Below | 22 |
| Summary of Argument | 23 |
| Argument | 26 |
| I. The power of the employer and the certified bargaining representative to establish wages, hours, terms and conditions of employment by collective bargaining agreement does not include the power to destroy or substantially to impair for the term of the agreement rights fundamental to self organization and concerted activity for mutual aid and protection granted to employees by the National Labor Relations Act | 26 |
| A. The constitutional limitations on state action provide the standard for delineating the collective bargaining powers | 26 |
| B. The constitutional principles which forbid state action interfering with distribution of leaflets are applicable | 33 |

Page

II. The location of the Company's plant and the widely dispersed location of employee homes make distribution on Company property essential to the effective exercise of Section 7 rights 44

III. The receipt of a *quid pro quo* from the employer in return for waiving the right of employees to distribute on company property, if such a *quid pro quo* could be inferred from, at most, acquiescence in an employer anti-distribution rule, does not serve to empower the union to bargain away Section 7 rights of employees ..... 50

IV. This Court's approval of no-strike clauses affords no precedent for no-distribution clauses . 52

V. A no-distribution rule if valid and enforced literally would serve to entrench the incumbent bargaining representative, thereby destroying the Section 7 rights of employees ..... 54

VI. The Board properly held that the right of employees to distribute on company property in favor of a challenging union must carry with it the right of employees to distribute in favor of the incumbent union ..... 55

Conclusion ..... 56

## AUTHORITIES CITED

CASES:

*Amalgamated Food Store Employees Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) ..... 44

*American Communications Assn.* v. *Douds*, 339 U.S. 382 (1950) .....28, 30

*American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 263 (1965) ..... 40

*Armco Steel Corp.* v. *N.R.L.B.*, 344 F.2d 621 (6th Cir. 1965) .....23, 50

*Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197 (1938) ..... 54

*Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711 (1945) .... 27

*Gale Products*, 142 N.L.R.B. 1246 (1963), set aside *N.L.R.B.* v. *Gale Products*, 337 F.2d 390 (7th Cir. 1964) .....20, 21, 23, 55

Page

*General Motors Corp.* v. *N.L.R.B.*, 345 F.2d 516 (6th Cir. 1965) ..... 23
*Hague* v. *C.I.O.*, 307 U.S. 496 (1939) .....33, 36, 38
*Humphrey* v. *Moore*, 375 U.S. 335 (1964) ..... 28
*International Union U.A.W.* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (1945) ..... 28
*Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667 (1961) 41
*Lovell* v. *Griffin*, 303 U.S. 444 (1938) .....33, 34, 43
*Machinists* v. *N.L.R.B.*, 415 F.2d 113 (8th Cir. 1969)..21, 55
*Marsh* v. *Alabama*, 326 U.S. 501 (1946) .....33, 34, 36, 40
*Martin* v. *City of Struthers*, 319 U.S. 141 (1943)....33, 34, 35, 37, 43
*Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1956) 52
*N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958) ..... 38
*New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).35, 54
*N.L.R.B.* v. *Allis Chalmers Corp.*, 388 U.S. 175 (1967).28, 32
*N.L.R.B.* v. *Gale Products*, 337 F.2d 390 (7th Cir. 1964) 20, 21, 23
*N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) ..... 40
*N.L.R.B.* v. *Le Tourneau Co.*, 324 U.S. 793 (1945) .... 39
*N.L.R.B.* v. *Mid-State Metal Products, Inc.*, 403 F.2d 702 (5th Cir. 1968) .....21, 52, 54, 55
*New York Times* v. *Sullivan*, 376 U.S. 254 (1964)....35, 54
*Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17 (1954).. 28, 29, 30, 31
*Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945) .....24, 39, 40, 49
*Roth* v. *United States*, 354 U.S. 476 (1957) ..... 33
*Schneider* v. *State*, 308 U.S. 147 (1939) ..... 33
*Standard Oil of California* v. *N.L.R.B.*, 399 F.2d 639 (9th Cir. 1968) ..... 44
*Staub* v. *City of Baxley*, 355 U.S. 313 (1958) ..... 37
*Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) .....23, 26, 28, 29, 30
*Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962) ... 41
*Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1956) .....28, 29
*Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 53
*Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 40
*Thomas* v. *Collins*, 323 U.S. 516 (1945) ..... 38
*U.A.W.* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (1945) ..... 28

Page

*United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960) ..... 30
*Vaca* v. *Sipes*, 386 U.S. 171 (1967) ..... 28
*Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248 (1944) ...29, 30, 31
*Whitney* v. *California*, 274 U.S. 357 (1927) ..... 54

CONSTITUTION AND STATUTES:

Constitution of the United States
First Amendment .....24, 25, 33, 36, 37, 38, 39, 41, 51
Fifth Amendment ..... 39
Fourteenth Amendment ..... 37

National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.* .....2, 24, 28, 29, 32, 33, 38, 50
Sec. 1 ..... 2
Sec. 7 .....2, 24, 25, 31, 39, 41, 44, 49, 50, 51, 54
Sec. 8(a)(1) .....,3, 19, 31, 33, 54, 55
Sec. 9(a) .....3, 23

Railway Labor Act, 45 U.S.C. 151, *et seq.* .....26, 27, 28

CONGRESSIONAL MATERIAL:

Senate Report 1150, 77th Cong., 2nd Sess., Part 1, 4-5.. 41
Senate Report No. 1184, on S. 2926, 79th Cong., 2nd Sess., reprinted 1 Leg. His. NLRA p. 1103 ..... 33

MISCELLANEOUS:

*Collectively Bargained Waiver of Plant Site Solicitation and Distribution*, 56 Iowa Law Review 152 (October 1960) .....43, 53
deGrazia, Sebastian, *Of Time, Work & Leisure* (20th Century Fund 1962) .....45, 46
Gilmer, Beverly, *Industrial Psychology* (McGraw-Hill, 1961) p. 232 ..... 48
Gould, William B., *The Question of Union Activity on Company Property*, 18 Vanderbilt Law Rev. 78, 145 (December 1964) ..... 43

Page

Gould, William B., *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. Law Rev. 505, 513 (January 1965) ..... 43

Labor Law—Collective Bargaining—Employer May Not Enforce Collective Bargaining Provision Embodying Union Waiver of Employee's Right to Solicit Against That Union, 22 Vanderbilt Law Rev. 664 (April 1969) ..... 43

Labor Law—Solicitation & Distribution on Company Premises During Non-Working Time and in Non-Working Areas Constitutes a Violation of Section 8(a)(1), 14 Villanova Law Rev. 552, 557 (Spring 1969) ..... 44

Work, Dennis P., *Solicitation Waiver in Collective Bargaining Agreement Held Invalid*, 16 Stan. Law Rev. 456 (March 1964) ..... 44

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-1637

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, RESPONDENT

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 13-15)[1] is reported at 474 F.2d 1269. The decision

[1] The designation Pet. App. refers to an appendix to the petition for a writ of certiorari in this case.

and order of the National Labor Relations Board (Pet. App. C, pps. 18-49) are reported at 195 NLRB No. 40.

## QUESTION PRESENTED

Whether a collective bargaining representative may lawfully waive the right guaranteed to employees by Section 7 of the National Labor Relations Act to distribute union literature during nonworking time in nonworking areas of the plant.

## STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449), as amended, 29 U.S.C. 151, *et seq.*, are as follows:

Section 1.

* * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

Section 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and

shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

## STATEMENT

### Bargaining History

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called the IUE, was first certified in December 1954 or January 1955 as the collective bargaining representative of the Company's employees at its Greeneville, Tennessee, plants and warehouses, which are the only facilities here involved (A 12).[2] At all times since, the IUE has continued to be the representative of the Company's employees (A 11).

The "Plant Rules" which the Company introduced as its Exhibit 6 (A 6-7, 127), and which all parties

[2] The designation "A"— followed by a number refers to the Appendix printed in this Court.

stipulated "were and are in effect, during material periods herein" (A 6-7), admittedly contained neither an express nor implied limitation on distribution on Company property. Indeed, these plant rules (A 127) contain no mention of the subject of distribution on Company property.

The only written notice the Company ever gave its employees that they were not to distribute on Company property appeared in the 1953 Employee Handbook (A 13, 36, 130) which the Company admits was never in use after the IUE was certified in 1954 or 1955 (A 39). The purely historic character of this 1953 Employee Handbook appears from the following answers by the Company's witness, Byron D. Sites, Director of Industrial Relations for Magnavox Company, to questions by counsel for the Company (A 39):

> Q. When did you stop distributing this employees handbook?
>
> A. About the time the Union was certified.
>
> Q. As I understand your testimony then, since the time the Union has been certified, you have maintained an employee handbook in your Personnel Office, but you have not distributed this to your employees?
>
> A. We have maintained copies of this book. However, we have not distributed this book as a current employee handbook, no.
>
> Q. Is there another employee handbook?
>
> A. No, sir.
>
> Q. If an employee—have you hired any employees in the last year?
>
> A. Yes, sir.
>
> Q. Are these employees made aware of Respondent's Exhibit No. 1?
>
> A. No, sir, we have not distributed this since 1955.

Q. Can I assume that the Respondent's Exhibit No. 1 has remained dormant since 1955?
A. Exhibit No. 1 handbook, yes, sir.

No limitation on distribution appeared in the list of rules set forth in this 1953 Employee Handbook (A 44, 136). Page 24 of this 1953 Employee Handbook listed as Rule 6, a ban on solicitation in the plant during working hours, but no rule against distribution appeared (A 44, 136). The full list of rules as they appeared in this 1953 Employee Handbook is as follows (A 44, 136):

PLANT RULES

The man who said, "Rules are made to be broken," was obviously a rule breaker, or he wouldn't have made such an untrue statement. Rules are made to be followed and observed, not broken. They are usually made only after long study and often after some very sad experience.

Rules at Magnavox are few, fair, and reasonable. We are expected to follow them. Violation of the following may lead to disciplinary action and possible discharge.

1. Reporting to work intoxicated.
2. Bringing or using alcoholic beverages or drugs on Company Property or during working hours.
3. Fighting on Company Property.
4. Stealing—either from fellow employees or from the Company.
5. Refusal to do work assigned.
6. Soliciting of any kind on Company Property during working hours.

7. Gambling on Company Property.
8. Disregard of the starting and quitting signals for shifts and rest periods.
9. Willful destruction or defacing of Company Property.
10. Unexcused absence exceeding three days or persistent absenteeism.
11. Vulgar and/or profane language.
12. Poor quality of work or production or interfering with work of other employees.
13. Failure to report to Foreman any accident.
14. Countermanding instructions of supervisor.
15. Horseplay.
16. Disobeying safety regulations.
17. Punching another employee's time card.
18. Leaving Company Property during working hours without permission.
19. Intentionally reporting incorrect production.

Although the 1953 Employee Handbook has not been used for any purpose since 1955 (A 39), a separate sheet of paper containing exactly the rules as quoted above and as set forth in the 1953 Employee Handbook, has been posted in the plant continuously for the past 20 years (A 6-7, 44-45, 127). The Company did not produce any list of rules which mentioned distribution. The only written formulation of an alleged rule against distribution which the Company relies

upon appeared on page 18 of the 1953 Employee Handbook and reads as follows (A 13, 36, 44, 130):

> HANDBILLS
>
> You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property.

Except for the above quoted notice appearing in this 1953 Employee Handbook which had been out of use for 15 years before the instant controversy arose, the Company has neither suggested that any other written formulation of this notice existed nor produced any more recent rule or notice relating to distribution. At the hearing when asked to identify the Company rule against distribution, the Company pointed to page 18 of the 1953 Employee Handbook and to nothing else (A 12-13).

Company witnesses also admit that at no time during the negotiation of any contract was there any discussion of distribution, let alone any discussion of the IUE's waiving any rights to distribute on Company property. The Company's Director of Industrial Relations, Sites, who served as the Company's chief negotiator and was present at all negotiations from the time the IUE was certified to date (A 10-12, 46) testified on cross-examination by Mr. Rolnick, appearing for the General Counsel of the NLRB (A 38):

> Q. (By Mr. Rolnick) With regard to the negotiations preceding the signing of Respondent's Exhibit No. 6, was anything said during those negotiations by or about that by entering into Article XII, Section No. 1, or Article XII, Section No. 3, the Union was waiving its right to distribute literature on Company property?
>
> A. Specifically, no.

Q. Am I correct sir, that the contract does not contain any provision on prohibiting Union distribution on Company property?

A. Specific provision, no, it is not.

Q. Just to speed this up, in any negotiation, has there ever been —— has it ever been expressly mentioned by the parties that by entering into Article XII, Section Nos. 1 and 3, the Union was waiving its right to distribute literature on Company property?

A. No, only that the Company had the right to make rules.

Q. Referring to Respondent's—The context in Respondent's Exhibits 6 through 10, do any of those contracts contain an expressed provision that the Union was waiving its right to distribute literature on Company property?

A. No specific statement at that time.

The only provision in the collective bargaining agreement on which the Company relies as establishing the IUE's waiver of the right to distribute on Company property during non-working hours is the following (A 5-6, 125):

ARTICLE XII

* * * 3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement.

Except for the last clause "nor will they conflict with the terms of this agreement," the identically same provision appeared in the original collective bargaining contract negotiated between the Company and the IUE in 1955 (A 23, 36, 134). The last clause was added in 1956 (A 17, 25-26, 36, 132). With this last clause, this provision appeared without change in all subse-

quent collective bargaining agreements (A 26-30), including the agreement dated July 1, 1968, which was in effect at the time the unfair labor practices here involved occurred (A 5-6, 23, 135). As far as any witness recalled, there was no attempt to change, nor any discussion of this provision in any of the negotiations except the first occurring in 1955 (A 40).

The description by Company Witness Sites, testifying from his notes made at the time of the 1955 negotiations (A 16), which negotiations resulted in the inclusion of a provision in the agreement for the Company to make rules, is as follows (A 14-16):

> Q. (By Mr. McPherson) Would you state what that is please, what has been marked as Respondent's Exhibit No. 2?
>
> A. This is a copy of the proposal made by the Company to the Union, Article 12, Item General.
>
> Q. And does that—excuse me?
>
> A. This was the 1955 proposal for the initial contract.
>
> Q. Now, this is the first contract that's being negotiated between the parties, is that correct?
>
> A. Yes.
>
> Q. Now, on that proposal, is there a proposal concerning rules and regulations?
>
> A. Yes, sir, there is.
>
> Q. Would you state what that is, please?
>
> A. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on Plant property. These rules will not be of a discriminatory nature.
>
> Q. Now, was that provision accepted by the Union as stated there?
>
> A. No, sir.
>
> Q. Would you relate to us please what transpired concerning that paragraph?
>
> A. The Union first suggested a—.
>
> * * *

THE WITNESS: In the discussion of the rules, the question—the Union raised the question of, or the proposal of a negotiating of the rules and making them a part of the contract and the Company opposed this feeling it was not the best way to establish rules but rather that the Company should take this action, make the rules and the Union should have the right to protest if they felt they were discriminatory type rules. Then, they suggested, then they asked if we had intentions of making additional rules beyond what were in the Employee's Handbook which was in effect at that time, at which time they had a copy of it. At a subsequent meeting a few days later, we advised them we had no immediate plans for any change in the rules. However, by our proposal that we would still have the right to make the changes when circumstances dictated it. They then asked, said well, there might be rules which would be not perhaps discriminatory but unfair rules and so we in turn said that we had no objection to adding an unfair along with discriminatory, so that they also could on either basis, they could be protested by the Union if they disagreed with the rules that we put forth and on this basis, we reached an agreement approximately March 7th or 8th, I'm not sure which of those dates it happened on this particular clause.

The bulletin board privileges afforded the IUE are subject to censorship by the Company, which has contracted for the right to eliminate from posting anything "controversial" (A 125). The bulletin boards were proffered by the Company and there is no contention made that the discussion of the bulletin boards involved any reference to the Union's right to distribute. Company witness Sites described the bargaining history of the bulletin board provision in the agreement as follows (A 23-24):

Q. Now, during that first negotiation, was there also a proposal concerning Union bulletin boards?

A. Yes, sir.

Q. And, would you relate to us what occurred concerning that proposal during those negotiations?

A. The Company made a proposal that we provide bulletin boards for the exclusive use of the Union and there was a discussion of the Company's retaining the right to approve all such notices on or to go on the bulletin board. We added an understanding that such notices would be automatically approved unless they were of a controversial nature. This was done to meet the Union's objectives.

* * *

Q. (By Mr. McPherson) Was there an agreement finally reached on the bulletin board as you stated?

A. Yes, sir.

Q. And, it is included in the collective bargaining agreement?

A. Yes.

Q. What page is that shown on?

A. That is on page 33, Article 12, Section 1 on over onto page 34.

Q. That is Respondent's Exhibit No. 6 that you are referring to?

A. Yes.

The foregoing includes everything in the bargaining history upon which the Company relied to show that the IUE had waived its right to distribute on Company property.

**The 1956 Request To Distribute**

Only once since the IUE won the NLRB election conducted in December 1954 (A 12) has there been any organizational activity among the Company's employees at the facilities here involved.

The first collective bargaining contract between the Company and the IUE was for a term of one year, from May 1, 1955 to April 30, 1956 (A 17, 135). A decertification election was run on March 21, 1956 (A 18) and resulted in the retention by IUE of its certified status (A 11). Prior to this election the Company permitted employees who were opposed to union representation to distribute anti-union leaflets in the plant (A 18, 20, 36, 133). When IUE supporters attempted to distribute pro-IUE leaflets in Company parking lots, they were driven off of plant property by Company guards (A 20-21, 36, 133). Edward Lingo, representing the IUE, both phoned and wrote the Company protesting its failure to permit IUE supporters to distribute leaflets, and specifically requesting that "IUE members be allowed an opportunity to distribute handbills in the plant as has our opposition" (A 18, 36, 133). The Company then replied that it considered it "improper to permit this type of campaigning within the plant by either party and therefore must refuse your request to permit such distribution" (A 21, 36, 134).

Except for this incident, no issue respecting distribution by the IUE or its members of organizational material has arisen at any time since 1956 (A 33). There has never been any contention that the IUE's requests, followed by denials by the Company, in May 1970 and thereafter, which gave rise to this proceeding, that its members be allowed to distribute leaflets at the time clocks during non-working time, involved "organizational" activities. The hearing officer rejected as immaterial (A 34-35), and his ruling in this respect was affirmed by the Board (Pet. App. C, p. 18), the Company offer to prove "that there is no organiza-

tional activity at its facility represented by this Union, there is no organizational effort by any other Union at its facility, now apparently under way to decertify or oust this Union as a representative of the employees in the bargaining unit" (A 35).

**Exceptions to the No-Distribution Rule**

Throughout the years and continuing down to the present time, the Company has regularly distributed a variety of material to its employees in the plant including its plant newspaper (A 48-49, 56, 58, 74, 83, 191). Employee Bobby Kinery testified without contradiction that copies of the Company News Letter had been handed to him in the plant on the line as he was working (A 74).

The Company magazine "Magnavox" has sometimes been distributed to employees in the plant (A 49, 58, 73). Apparently in an attempt at creating an appearance of nondiscrimination, the Company has on occasion had the guard distribute the magazine to employees at the gate. However, the conditions under which the guard distributed in no way compared with the condition of cars rushing by four abreast with which the IUE distributors had to cope when they attempted distributions outside the plant gate (A 74-75, 82-83). The guard, on the days on which he handed out the Company magazine "Magnavox," moved the fence over so the cars could only exit one at a time and controlled traffic so he could hand a copy of "Magnavox" to each employee (A 73) instead of attempting to cope with the cars rushing by four abreast (A 74-75, 82-83).

The Company, also in an effort to establish the nondiscriminatory character of its refusal to allow the

IUE to make distributions on plant property, introduced testimony that the Company had many requests from merchants, politicians and civic organizations for permission to make distribution of leaflets or flyers on Company property but the Company had uniformly refused all such requests (A 42, 58). The Company, however, did pass out United Fund literature in the plant (A 91, 102).

The Company contends that the only exception which it ever made was the granting of permission to the IUE on one occasion to distribute in the plant literature describing a charity, known as the City of Hope, and the date upon which the union would have representatives present at the gate to receive contributions for the City of Hope (A 31-32, 55, 58).

**Allegedly Relevant Contract Provisions**

The only provisions in the collective bargaining agreement in effect at the time of the unfair labor practices here found, May and June 1970, upon which the Company relies, are the following (A 5-6, 125):

ARTICLE XII

*General*

1. The Company will provide one (1) bulletin board in Plant #1 (if bargaining unit employees are regularly assigned there), two (2) bulletin boards in Plant #2 and six (6) bulletin boards in Plant #3 which will be used exclusively for the posting of Union notices. Such notices must be approved by the Manager of Industrial Relations or his designated representative and will be placed on the board by the Personnel Department. It is understood that such notices will be automatically approved unless they are of a controversial nature.

These bulletin boards will be labeled "Local 796, IUE-AFL-CIO-CLC."

* * *

3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement.

**May and June 1970 Requests To Distribute**

It was stipulated that on May 21, 1970 the Union requested permission from the Manager of Industrial Relations to distribute literature at the time clock and at a later date permission was denied (A 9). The request was made of Company officials by Richard Fisher, an IUE representative, during a grievance meeting (A 55). The Company took his request under advisement and the next day informed him that his request was denied (A 55). The oral request was then followed by a letter dated June 25, 1970 to the Company from counsel for the Union stating that it has been called to his attention that the Company is refusing to permit the Union to distribute Union literature on Company property and requesting the revocation by the Company of all rules forbidding solicitation or distribution on Company property, including the no solicitation rule which appears as Rule 6 in the set of Company promulgated rules (A 127, 136). In his letter to the Company, counsel for the IUE took the position that such rules were unlawful. He stated (A 3, 4, 121):

> It has been called to my attention by officers of IUE Local 796 that The Magnavox Company of Tennessee has adopted and/or enforced unlawful no-solicitation and no-distribution rules. This let-

> ter is to request that these rules be withdrawn immediately. Specifically, I request that Rule 6 of the plant rules be revoked immediately. In reference to no-solicitation, it is the position of the Union that employees should be allowed to solicit on nonwork time any place on Company property including work areas of the plant. It has also been called to my attention that the Employer is refusing to allow employees to distribute literature on Company property. It is the position of IUE that an employee should be allowed to distribute literature in nonwork areas of the Employer's property, including nonwork areas of the plant on the employee's own time.

By letter dated July 16, 1970, the Company replied, stating (A 4, 5, 122):

> As to solicitations, the Company does allow employees to solicit during non-work time in both non-work and work areas of the plant. As to distribution of literature, the Company by the collective bargaining agreement has the right to make rules and regulations. The only limitation to this right is that such rules will not be unfair or of a discriminatory nature. (Article XII, Paragraph 3, Page 59 of the Collective Bargaining Agreement) As part of this right, the Company formulated the no-solicitation rule which prohibits the distribution of literature on Company property. We feel this rule is neither unfair nor discriminatory in nature and that the Union as part of the collective bargaining process has waived its right to distribute literature on Company property. Further, by contract, a bulletin board is provided by the Company exclusively for posting union notices.

The Union thereafter filed the charges with the NLRB which instituted this proceeding (A 106).

**The Problem of Access to the Company's Employees**

The Company at the time of the hearing herein employed 2,300 employees in the bargaining unit represented by the IUE (A 57, 62-63). The number had been as large as 3,000 during the preceding year (A 60). This was a great increase in numbers over those employed at the time the Union organized and was certified (A 83). The employees lived scattered over a wide area in a two-state region (A 62-63, 93). The plant is located in Greeneville, Tennessee (A 11-12). Some of the workers live across the state line in Morrison, North Carolina (A 62). Others live in Johnson City, Tennessee, which is 30 miles distant from the plant (A 62).

All of the employees go to and from work by automobile (A 61). They park their cars on Company owned parking lots (A 7-8, 20, 128, 129). The Union has found it impossible to place leaflets in the hands of the employees as they drive to and from work because the cars go through the plant gates four abreast at such a rate of speed as to endanger the life of anyone venturing out between the lanes (A 72-75, 82-83, 95, 99-103). If a worker slows his car down to receive a leaflet, the traffic backs up (A 73-74, 87-88, 90, 101) and causes employees to be late to work which not only results in their pay being docked but also their personnel records being marked with a demerit which can be counted in assessing progressive discipline (A 60-61, 88).

The Company censors all material tendered by the Union for posting on the bulletin boards (A 58-59, 64-65, 94). Nor is the material which does get posted readily accessible to all employees. In the plants here involved there are only three bulletin boards, located

near the time clocks, where some 2,400 to 2,500 employees (including non-unit employees) who work on the first shift punch their time cards as they rush to and from the plant (A 57, 52-64). Obviously very few employees are reached directly by these bulletin boards. There are also two other bulletin boards in the warehouses, one in each warehouse, but only a small number of persons are employed in each warehouse (A 57.) Even though notices of Union meetings are posted on bulletin boards, often employees do not even hear of the notices and miss meetings because they did not know the meeting was being held (A 95).

The Union has tried mailing literature to employees at their homes (A 92). The Union cannot afford the expense of frequent mailings, and in addition, has difficulty in getting the employee's correct address so that many of the mailed-out notices are returned for lack of proper address (A 92-93).

The Union has always found it impossible to reach employees without the use of on-the-property distribution but had never raised the issue before because it believed it would have been useless (A 94). The issue was raised in May and June of 1970 because the Union had heard that a recent decision of this Court protected employees in the right to distribute literature on Company property (A 55, 94, 96-97).

### The Board's Decision and Order

The Trial Examiner found (Pet. App. C, pp. 39-40), and the Board agreed (Pet. App. C, pp. 19-20), that the Company has for many years "maintained a rule prohibiting the distribution of literature on Respondent's parking lots and on other Company property" Pet. App. C, p. 19), that with respect to the need for

such a rule no "evidence of necessity whatsoever has been shown" (Pet. App. C, p. 40), that "this rule was presumptively invalid" (Pet. App. C, p. 39), and that, "as applied to employee distribution of organizational literature in nonworking areas on nonworking time, the rule was not justified by any extraordinary operational or disciplinary needs of Respondent" (Pet. App. C, p. 19).

The Trial Examiner found that the Union had never expressly waived its right to distribute on Company property but that the Union had acquiesced in the maintenance and enforcement by the Company of a ban on distribution on company parking lots or other Company property (Pet. App. C, pp. 41-42). The Board arrived at a "smiliar conclusion," expressly basing its conclusion on the fact that "(1) The contract terms expressly reserve to the Respondent broad rule-making powers; (2) the contract clauses currently describing the reserved management powers have appeared in all prior contracts of the parties over the 16-year period of their bargaining relationship; (3) the no-distribution rule, as now maintained, was in existence when the first contract between the parties was negotiated and has been in force continuously ever since; and (4) neither the Union nor the employees have heretofore challenged Respondent's right to maintain and enforce the rule, but rather have accepted and obeyed its terms" (Pet. App. C, pp. 19-20).

Both the Trial Examiner and the Board found that the Company had nevertheless violated Section 8(a)(1) of the Act by maintaining a rule which imposed a broader restriction on the rights of employees to distribute literature than is legally permissible, even where

the bargaining representative had waived its objections thereto (Pet. App. C, pp. 20-24, 43-44).

In the Trial Examiner's view the vice in the rule was that it would interfere with the employee's statutory rights of self-organization by barring employees from distributing organizational material in support of decertification of the IUE or in support of another union should they wish not to be further represented by the IUE (Pet. App. C, pp. 43-44). The Trial Examiner found (Pet. App. C, p. 44):

> To the extent, therefore, that the rule prohibits the employees from distributing literature, other than that of the Union, during nonworking time and in nonworking areas of Respondent's premises, it is invalid and violates Section 8(a)(1) of the Act.

In so finding the Trial Examiner followed and applied the principles first enunciated by the Board in *Gale Products,* 142 NLRB 1246 (1963), set aside *NLRB* v. *Gale Products,* 337 F.2d 390 (7th Cir. 1964).

At the request of the Company, the Board reexamined its *Gale Products* holding (Pet. App. C, pp. 20-21). The Board reaffirmed that portion of the *Gale Products* holding (142 NLRB at 1249) which appears in the following quotation (Pet. App. C, p. 21):

> The validity of a contractual waiver of employee rights must depend, however, upon whether the interference with employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver. Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlimited contrac-

> tual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.
>
> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.

The Board, however, took note that the Fifth Circuit in *NLRB* v. *Mid-State Metal Products, Inc.*, 403 F.2d 702, 5th Cir. 1968), "earlier suggested" and the Eighth Circuit in *Machinists* v. *NLRB*, 415 F.2d 113 (8th Cir. 1969), held that the Board's *Gale Products* remedy was unfair because it "subjected employees who chose to support the contracting union to the prohibitions of the no-distribution rule while at the same time exempting dissident employees from such prohibition" (Pet. App. C, p. 23). The Board expressed its agreement with the Fifth and Eighth Circuits in this regard. The Board stated (Pet. App. C, p. 24):

> We believe the course mapped out for us by the decision of the Eighth Circuit in *Machinists* v. *N.L.R.B., supra,* and earlier suggested by the Fifth Circuit in *Mid-States Metal Products, supra,* best serves to effectuate the fundamental purposes of Section 7 of the Act and the rights it guarantees.
>
> We therefore feel it appropriate to modify the remedy announced in *Gale Products* and followed in related cases, insofar as that remedy prohibits employee distribution of literature by or on behalf of members of an incumbent labor organization which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other

matters related to the exercise by employees of their Section 7 rights.[9]

[9] As our holding is concerned solely with the exercise by *employees* of their Section 7 rights, it is not to be taken as licensing in any way the distribution of institutional—as distinguished from purely organizational—literature of a labor organization which has acquiesced in an employer's promulgation or maintenance of a broad no-distribution rule.

The Board entered an order requiring the Company to (Pet. App. C, p. 25):

> Cease and desist from maintaining, giving effect to, or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or other matters related to the exercise by employees of their Section 7 rights.

**The Decision of The Court Below**

Each, the IUE and the Company, filed a petition for review in the United States Court of Appeals for the Sixth Circuit. The IUE challenged the substantiality of the evidence to support the Board's finding that the union had waived the right of the union and the employees to distribute literature on Company property. In denying the Union's petition for review the court below stated (Pet. App. A, p. 15):

> [O]n a less restricted review we might have found that the contract provision permitting the Company to issue rules and regulations did not waive the right to distribute literature even in the context of a preexisting no-distribution rule. Waiver of a right of such importance should be the subject of an express provision.

The court below, however, in response to the Company's petition for review, set aside the Board's Order, following in this respect the Sixth Circuit's holdings in *Armco Steel Corp* v. *NLRB,* 344 F.2d 621 (1965) and *General Motors Corporation* v. *NLRB,* 345 F.2d 516 (1965), in which that court had earlier disagreed with the Board's *Gale Products* decision (Pet. App. A, pp. 14-15). The court below stated (Pet. App. A, p. 15):

> We are not persuaded that our ruling in *Armco Steel* should be overturned at this time, and we adhere to the position that the bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here.

## SUMMARY OF ARGUMENT

I. The majority rule principle adopted by Section 9(a) of the National Labor Relations Act does not empower the employer and the Union to enter into a collective bargaining agreement which impairs or restricts to any substantial degree the employees' freedom to proselytize fellow employees with respect to changes in bargaining representatives or other concerted activities for mutual aid or protection. The power conferred by the National Labor Relations Act on the representative chosen by the majority to bind the minority, as this Court held in *Steele* v. *Louisville & N.R.R.,* 323 U.S. 192 (1944), is like the power of a legislature and subject to the same "constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates" (323 U.S. at 198). In considering the validity of a collectively bargained waiver of employee rights to distribute leaflets on Company owned park-

ing lots, and other non-work areas of employer property, the First Amendment freedoms therefore supply the measuring stick.

Just as, with respect to political democracy, a legislative body, no matter how unanimous or nearly unanimous its mandate at the polls, cannot destroy or substantially impair freedom of the press, so with respect to industrial democracy, the bargaining representative cannot destroy or substantially impair the right of employees to distribute leaflets to each other respecting matters related to self-organization or other concerted activities for mutual aid or protection. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945), this Court upheld the determination of the Board that the employer's parking lots were the uniquely appropriate place for distribution of leaflets by employees relating to their problems as employees. To empower a collective bargaining agent, by agreement with an employer, to destroy basic rights of freedom of communication between employees which are guaranteed protection against state intrusion by the First Amendment and against employer intrusion by the National Labor Relations Act, would have the effect of freezing in power the incumbents, a result in conflict with the basic premise of the National Labor Relations Act.

II. The right of employees in the instant case to communicate with each other by freely distributing leaflets on Company-owned parking lots or other non-work areas of Company property is essential to the effective exercise of Section 7 rights, in view of the location of the employer's property which makes distribution on public property an impossibility and in view of the widely distributed location of employee

homes. The record here establishes that no viable alternative exists, as the Board impliedly held when it determined that the employer's rule would be invalid except for the Union's alleged waiver.

III. There is no issue in this case with respect to the validity of a surrender of Section 7 rights in return for a *quid pro quo*. Admittedly no bargaining for a waiver ever took place and the waiver was solely based on acquiescence. However, the rights of communication between employees in the most appropriate place therefor are so basic to the operation of the system of collective bargaining that no surrender for a *quid pro quo* would be valid.

IV. The conceded validity of no-strike clauses affords no precedent. No-strike clauses have no effect on the right of employees to proselytize each other. The object of Congress to permit a stabilization of wages, hours and working conditions contemplated that in the exercise of collective bargaining power unions would establish grievance and arbitration machinery which would displace the right to strike for the term of the contract. The relationship of freedom of communication to the purposes of the Act negate any Congressional intent to grant unions and employers the power to entrench the incumbent union. Nor can such an intent by Congress be validly inferred for it would raise problems of constitutionality under the First Amendment.

V. A. no-distribution rule if valid and enforced literally would serve to entrench the incumbent bargaining representative, thereby destroying the Section 7 rights of employees.

VI. The Board properly held that the right of employees to distribute on Company property in favor

of a challenging union must carry with it the right of employees to distribute in favor of the incumbent union. Any other result is unfair and one sided.

## ARGUMENT

### I.

### The power of the employer and the certified bargaining representative to establish wages, hours, terms and conditions of employment by collective bargaining agreement does not include the power to destroy or substantially to impair for the term of the agreement rights fundamental to self-organization and concerted activity for mutual aid and protection granted to employees by the National Labor Relations Act.

#### A. The constitutional limitations on state action provide the standard for delineating the collective bargaining powers.

In *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 198-199 (1944), this Court held that the provisions of the Railway Labor Act, 45 U.S.C 151, *et seq.*, which confer exclusive bargaining rights on the union selected by the majority, would be subject to grave constitutional issues as to their validity if these powers were not construed as subject to the same limitations as the Constitution imposes on Congress (323 U.S. at 198):

> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative it is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate

> against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

In order not to be faced with this constitutional issue this Court held that the Railway Labor Act must be construed as imposing on the bargaining representative these constitutional limitations (323 U.S. at 202-205):

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, *cf. J. I. Case Co.* v. *N.L.R.B., supra,* 335, but it also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

Cf. *Elgin, J.&E. Ry.* v. *Burley,* 325 U.S. 711, 751-752 (1945), characterizing the majority rule provisions of the Railway Labor Act as an "instrument of government" but holding that the collective bargaining powers conferred on the employer and the union did not include the power to settle past grievances of employees unless so authorized by either a provision in the union constitution conferring this power or an authorization

from the employee in some other manner than merely the certification of the union.

This Court in a footnote to the opinion in the *Steele* case noted that Congress in adopting the National Labor Relations Act has expressly stated its intent to make the same majority rule principle as was adopted by the 1934 amendments to the Railway Labor Act applicable to all employers reached by the commerce power (323 U.S. at 202, fn. 3):

> Compare the House Committee Report on the N.L.R.A. (H.Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22) indicating that although the principle of majority rule "written into the statute books by Congress in the Railway Labor Act of 1934" was to be applicable to the bargaining unit under the N.L.R.A., the employer was required to give "equally advantageous terms to nonmembers of the labor organization negotiating the agreement." See also the Senate Committee Report on the N.L.R.A. to the same effect. S.Rep. No. 573, 74th Cong., 1st Sess., p. 13.

In subsequent cases this Court has held that the state action analogy enunciated in the *Steele* case is equally applicable to the majority rule provisions of the National Labor Relations Act, 29 U.S.C. 159 (a). *International Union, U.A.W.* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, 252 (1949); *American Communications Assn.* v. *Douds;* 339 U.S. 382, 401-402 (1950); *Radio Officers Union* v. *N.L.R.B.,* 347 U.S. 17, 47-48 (1954); *Syres* v. *Oil Workers International Union,* 350 U.S. 892 (1956); *Humphrey* v. *Moore,* 375 U.S. 335, 342 (1964); *Vaca* v. *Sipes,* 386 U.S. 171, 183 (1967); *N.L.R.B.* v. *Allis Chalmers Corp.,* 388 U.S. 175, 180 (1967).

The very same day that this Court announced its decision in the *Steele* case, this Court also decided a companion case under the National Labor Relations Act in which the same principles as governed in the *Steele* case were held applicable to the whole range of powers conferred by the majority rule principle adopted by Section 9(a) of the National Labor Relations Act, and not merely to problems of racial discrimination. *Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248, 255-256 (1944). Indeed, except for one case in which this Court summarily reversed without argument,[8] none of the numerous cases arising under the National Labor Relations Act in which this Court has cited and applied the principles of the *Steele* case have involved racial discrimination.

In *Wallace* and *Radio Officers,* the issue raised was similar to that present here in that the employer argued that employer conduct, which would constitute unfair labor practices but for the provisions of a collective bargaining agreement, had gained immunity through agreement of the certified bargaining representative. In both cases the agreement of the union, given by the union by its signature to the collective bargaining agreement, was held an invasion of fundamental rights conferred by the statute and hence ineffective to immunize employer violations. In *Wallace* this Court stated (323 U.S. at 255-256):

> The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing

[8] *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1956).

> their interests fairly and impartially. Otherwise employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation.
>
> * * *
>
> We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers.

This Court has repeatedly cited the *Steele* and *Wallace* cases together in support of the state action analogy. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, 401-402 (1950), referring to *Steele* and *Wallace*, this Court stated (339 U.S. at pp. 401-402):

> The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-580 (1960), this Court characterized the collective bargaining relationship as "industrial self-government."

In *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 47-48 (1950), this Court similarly stated:

> We do hold that in the circumstances of this case, the Union being exclusive bargaining agent for

both member and nonmember employees, the employer could not, without violating § 8(a)(3) discriminate in wages solely on the basis of such nonmembership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless to make agreements more favorable to the majority than to the minority.[54] Such discriminating contracts are illegal and provide no defense to an action under § 8(a)(3).

[54] S. Rep. No. 573, 74th Cong., 1st Sess. 13. During a debate on the Act Senator Wagner stated 'under this proposed legislation, assuming an agreement has been consummated by the agency selected by the majority of the employees, there will be no advantage which a majority can have under an agreement, to which the minority is not also entitled.' 79 Cong. Rec. 7673.

While the discrimination between majority and minority in *Wallace* and *Radio Officers* related to jobs and rates of pay, there is even more reason to hold that the same limitations on restriction of freedom of speech and press which restrain state action by governmental agencies restrain limitations enforced by collective bargaining agreement on the exercise of the freedom to communicate effectively which Congress by Section 7 and 8(a)(1) granted to all employees, both those who voted for the majority union and those who voted against. Congress granted these rights as a means to obtain improvements in economic benefits. If it violates the Act to discriminate between minority and majority with respect to the benefits, as *Wallace* and *Radio Officers* hold, a fortiori it must violate the Act to discriminate with respect to the basic freedoms which make possible the other improvements.

In *N.L.R.B.* v. *Allis Chalmers Corp.*, 388 U.S. 175, 180 (1967), this Court expressly recognized that the state action analogy adopted in the *Steele* case was applicable to the National Labor Relations Act (388 U.S. at 180):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . .' *Steele* v. *Louisville & N. RR Co.*, 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment,[3] and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term[4] and his right to refuse to cross a lawful picket line.[5] The employee may disagree with many of the union decisions but is bound by them. The majority rule concept is today unquestionably at the center of our federal labor policy.

---

[3] See *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332; *Medo Photo Supply Corp.* v. *Labor Board*, 321 U.S. 678; *ILGWU* v. *Labor Board*, 366 U.S. 731, 737.

[4] See *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 280.

[5] *Labor Board* v. *Rockaway News Co.*, 345 U.S. 71.

The legislative history of the National Labor Relations Act supports the state action analogy. In explaining the intent of the language which now appears in Section 8(a)(1) of the National Labor Relations Act the Senate Report states (S. Rep. No. 1184 in S. 2926, 79th Cong. 2d Sess, reprinted 1 Leg. His. NLRA, p. 1103):

> The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.

**B. The constitutional principles which forbid state action interfering with distribution of leaflets are applicable.**

This Court has long held that state action which operates as a substantial restriction or impairment of the right to distribute leaflets violates the freedom of the press guarantee of the First Amendment. *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938); *Hague* v. *C.I.O.,* 307 U.S. 496, 501, 518 (1939); *Schneider* v. *State,* 308 U.S. 147, 162 (1939); *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943); *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946).

The "vital" role in the "maintenance of democratic institutions" of the right to distribute leaflets could hardly be stated in any stronger language than that repeatedly used by this Court. *Schneider* v. *State,* 308 U.S. at 151:

> This court has characterized the freedom of speech and that of the press as fundamental personal

rights and liberties. * * * It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. * * * Mere legislative preference * * * may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. (Footnote omitted)

*Marsh* v. *Alabama,* 326 U.S. at 509:

As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men".

*Lovell* v. *Griffin,* 303 U.S. at 542:

The liberty of press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

*Martin* v. *Struthers,* 319 U.S. at 146-147:

Freedom to distribute information * * * is so clearly vital to the preservation of a free society * * * it must be fully preserved.

*Roth* v. *United States,* 354 U.S. 476, 484, 488 (1957):

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

* * *

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. (footnotes omitted)

*New York Times* v. *Sullivan,* 376 U.S. 254, 269 (1964):

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 467, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California,* 283 U.S 359, 369.

And quoting from Jefferson in *Martin* v. *Struthers,* 319 U.S. at 143, fn. 3:

> The only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure." Jefferson to Lafayette, *Writings of Thomas Jefferson,* Washington Ed., v. 7, p. 235.

There is no crescendo in the praise by this Court for the efficacy of the right of free press to our historic freedoms. The lanuage has always been in the superlative. But the places in which the exercise of this right must be privileged has shown a steady expansion. In *Hague* v. *C.I.O.*, 307 U.S. 496, 515-516, this Court held that public streets and parks were appropriate places in which to exercise First Amendment rights. This Court stated (307 U.S. at 515):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

In *Marsh* v. *Alabama*, 326 U.S. 501, 507-509, it was the privately owned streets of a company town which were held appropriate places in which religious literature might be distributed. This Court state (326 U.S. at 508-509):

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First Amendments than there is for curtailing these freedoms with respect to any other citizen. (footnotes omitted)

This Court there balanced the property rights of the owners of the company town with the First Amendment rights of its inhabitants and concluded that the property rights were entitled to very little weight (326 U.S. at 509):

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. (footnote omitted)

In *Martin* v. *City of Struthers,* 319 U.S. 141, the distributors of religious leaflets, without prior invitation, went on the private property of home owners and knocked on their doors, offering literature free. This Court there held the place where distribution took place was immaterial to the protection of the First Amendment (319 U.S. at 146-147):

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.

In *Staub* v. *City of Baxley,* 355 U.S. 313, 322, fn. 5 (1958), this Court stated that the First Amendment right there, which the State attempted to regulate by requiring a permit, involved only the exercise by the union of these rights in the homes of employees.

In three of the cases in which this Court has invalidated state action as unconstitutional infringement on First Amendment rights, the rights of free speech, free press and free assembly were invoked in aid of the activities of employees for self-organization and other

concerted activities for mutual aid and protection. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958). This Court held that the same rights of self-organization and mutual aid which Congress protected against employer invasion by its enactment of the National Labor Relations Act, were protected by the First and Fourteenth Amendments from invasion by action of states and municipalities.

In the subsequent decision of *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 460-461 (1958), this Court stated the principle which is derived from all the foregoing cases as follows (357 U.S. at pp. 460-461):

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge* v. *Oregon*, 299 U.S. 353, 364; *Thomas* v. *Collins*, 323 U.S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow* v. *New York*, 268 U.S. 652, 666, *Palko* v. *Connecticut*, 302 U.S. 319, 324; *Staub* v. *City of Baxley*, 355 U.S 313, 321; *Cantwell* v. *Connecticut*, 310 U.S. 296, 303. Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom is subject to the closest scrutiny.

The right of employees to distribute union literature or leaflets on employer-owned parking lots was first

brought before this Court in *N.L.R.B.* v. *LeTourneau Co.*, 324 U.S. 793 (1945), decided together with *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). Since only one opinion was issued in the two cases, and they are generally known as the *Republic Aviation* case, hereinafter this decision will be designated as the *Republic Aviation* case. This Court in the *Republic Aviation* case agreed with the N.L.R.B. that the employer interfered with rights guaranteed employees by Section 7 of the National Labor Relations Act by maintaining a rule forbidding distribution of literature on company property. The opinion of this Court in *Republic Aviation* took no cognizance of the fact that the statutory rights of employees to communicate freely without employer interference paralleled their First Amendment rights and its only reference to constitutional rights was the quotation of language from the Second Circuit in which the employer's property rights, though protected by the Fifth Amendment, are held in balance subordinate to the statutory right of the employees. The reference to the Fifth Amendment appears in the following context (324 U.S. at 803):

> In the *LeTourneau Company* case the discussion of the reasons underlying the findings was much more extended. 54 NLRB 1253, 1258, *et seq.* We insert in the note below a quotation which shows the character of the Board's opinion.[8]

---

[8] 54 NLRB at 1259-1260: "As the Circuit Court of Appeals for the Second Circuit has held, 'It is not every interference with property rights that is within the Fifth Amendment and inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.' The Board has frequently applied this principle in decisions involving varying sets of circumstances, where it has held that the employer's right to control his property does not permit him to deny access to his property to persons

In a subsequent case this Court indicated a recognition of the fact that statutory rights involved in the *Republic Aviation* case paralleled constitutional rights and served the same function in industrial democracy as the First Amendment rights serve in political democracy. In *Marsh* v. *Alabama,* 326 U.S. 501, 506, this Court cited *Republic Aviation* as follows:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. *Cf. Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 793, 65 S.Ct. 982, 985, 987, note 8, 157 A.L.R. 1081.

In opinions of Justices of this Court *Republic Aviation* has repeatedly been cited as holding that an employer no-distribution rule "has no inferable legitimate business purpose," *N.L.R.B.* v. *Great Dane Trailers, Inc.,* 388 U.S. 26, 35 (1967), Mr. Justice Harlan, dissenting; "no significant employer justification," *American Ship Building Co.* v. *N.L.R.B.,* 380 U.S. 300, 339 (1965), Mr. Justice Goldberg, concurring. Cf. *Textile Workers* v. *Darlington Mfg. Co.,* 380 U.S. 263, 268-269

---

whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining, and in those decisions which have reached the courts, the Board's position has been sustained. Similarly, the Board has held that, while it was 'within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,' it was 'not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,' the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization."

(1965); *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 680 (1961).

On the employee side of the scales the Section 7 rights are as essential to the workability of the collective bargaining structure which Congress sought to protect as First Amendment rights are to political democracy. As stated in the Senate Report on Violations of Free Speech and Rights of Labor (S.Rep. No. 1150, 77th Cong., 2d Sess, Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

Section 7 guarantees are statutory replicas of First Amendment rights. They impose on employers the same restrictions as the Constitution imposes on state action.

In the instant case the Trial Examiner found (Pet. App. C, p. 39) and the Board affirmed his finding (Pet. App. C, p. 19) that the Company's rule against distribution is presumptively invalid under the Board's well established standards for judging such rules. These standards are set forth in *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962), and as applicable to this case are as follows):

> * * * the no-distribution rule maintained by the Respondent is presumptively invalid on its face, as applied to employees who may wish to dis-

> tribute union literature, since its reach is not limited to working time or to the working areas of the plant. We also find that the presumption of invalidity is not overcome by the testimony of Carson Butcher, Respondent's vice president, that the rule was adopted years ago for the purpose of "keeping down the litter * * * and fire hazards * * * in the plant." The mere assertion that a broad no-distribution rule has this purpose hardly proves that it is actually "necessary" for the employer to prohibit union handbilling for his own employees in nonworking areas in order to "maintain production or discipline" (*Babcock & Wilcox, supra*). Such necessity is not shown here.

After quoting the foregoing, the Trial Examiner commented that "in the instant case, no evidence of necessity whatsoever has been shown." (Pet. App. C, p. 40). The Board in affirming added "that, as applied to employee distribution of organizational literature in nonworking areas on nonworking time, the rule was not justified by any extraordinary operational or disciplinary needs" of the Company (Pet. App. C, p. 19).

Thus the employees would be entitled to freely communicate by distributing leaflets on the parking lots and other non-work areas of the Company's property were it not for the historical acquiescence of the Union in this employer rule. The record establishes that this acquiescence was based either on ignorance that the Company claimed to have such a rule or unawareness that such a rule was illegal or both (A 55, 94, 96-97).

The Board having found that the Union must be deemed to have waived this rule and that the waiver is to be treated as a provision in the collective bargaining agreement that the Company may have this rule (Pet.

App. C, pp. 19-24) and the Union not having petitioned for certiorari, is here bound by this finding. Hence, the Union must argue this case as if the Union had agreed with the Company that even though this Company had no reason for this rule, the Company could bar distribution by any employee of any literature on Company property. The validity of such an arrangement between union and employer then must be judged by the power of union and employer to enter into such an agreement. Applying the political analogy principle of the *Steele* case, the validity of the Company's rule is to be judged by the same standards as if a state or municipality had forbidden the leafletting. Under the principle of *Lovell* v. *Griffin* and *Martin* v. *City of Struthers,* the state or municipality could not make such a rule. It follows that the employer and the union, having shown no interest justifying the restriction, cannot validly so agree.

Law review commentators are generally in accord that the right to solicit memberships and the right to distribute union literature "are too closely related to the Act's essence, the spread of collective bargaining, to permit a legally effective waiver." William B. Gould, *The Question of Union Activity on Company Property,* 18 Vanderbilt Law Rev. 78, 145 (December 1964). To the same effect, *Collectively Bargained Waiver of Plant-Site Solicitation and Distribution,* 56 Iowa Law Rev. 152 (October 1960); William B. Gould, *Union Organizational Rights and the Concept of 'Quasi-Public' Property,* 49 Minn. L.Rev. 505, 513 (January 1965); *Labor Law—Collective Bargaining—Employer May Not Enforce Collective Bargaining Provision Embodying Union Waiver of Employee's Right to Solicit Against That Union,* 22 Vanderbilt Law Rev.

664 (April 1969); *Labor Law—Solicitation and Distribution—Collective Bargaining Proviso Prohibiting Employee Solicitation and Distribution on Company Premises During Non-Working Time and in Non-Working Areas Constitutes a Violation of Section 8 (a)(1),* 14 Villanova Law Rev. 522,557 (Spring 1969); Dennis P. Work, *Solicitation Waiver in Collective Bargaining Agreement Held Invalid,* 16 Stan. Law Rev. 456 (March 1964).

## II.

**The location of the Company's plant and the widely dispersed location of employee homes make distribution on Company property essential to the effective exercise of Section 7 rights.**

The Company has so located its plant that employees cannot stand at a plant gate and hand out leaflets to fellow employees walking in or out. Employees all drive to and from work (A 61). The plant gates allow cars to enter or exit four abreast at fast speeds (A 72-75, 82-83, 95, 99-103). "The task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be were" employees able to pass them directly to the intended recipient. *Amalgamated Food Store Employees Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 322 (1968). Cf. *Standard Oil Co. of California* v. *N.L.R.B.,* 399 F.2d 639, 640 (9th Cir. 1968). When workers slow down to receive a leaflet, traffic backs up (A 73-74, 87-88, 90, 101). Employees who are late to work not only get their pay docked but may accumulate demerits which count with others in assessing progressive discipline (A 60-61, 88).

There are some 2300 employees in the bargaining unit who live scattered over a two state area covering

more than one hundred square miles. The plant is located in Greeneville, Tennessee (A 11-12). Some workers live in Johnson City, Tennessee, 30 miles distant from the plant, and others live in Morrison, North Carolina (A 62). Reaching employees by mail is expensive and address lists are often inaccurate (A 92-93).

The record here depicts workers rushing by car to work, rushing home again (A 60-61, 73-74, 87-88, 90, 101). The Company employee conforms in these respects to the average worker described in a recent study by Sebastian de Grazia, *Of Time, Work & Leisure* (20th Century Fund 1962). Consideration of the realities of communication between union and employees and of employees *inter se* which are crucial to the effective exercise of Section 7 rights requires an understanding of the rush nature of the worker's life. De Grazia summarizes his finding as follows:

> * * * the average American male who works full time—that is, at least 35 hours a week * * * works nearly 48 hours a week.[4]
>
> Never before have so many Americans had so little time to call their own.[5]
>
> The rule of thumb reckons that men spend 10 to 20 percent of their working life going back and forth between home and work.[6]

The surveys of modern living measure the time spent by the average worker in do-it-yourself activities required to keep his home, his car, and his other be-

---

[4] Sebastian de Grazia, *Of Time, Work & Leisure* (20th Century Fund 1962), p. 70.

[5] *Ibid.*

[6] *Id.*, at pp. 72-73

longings in shape as in effect a form of moonlighting compelled by present day living standards. In showing how these activities cut into the supposedly free time of the present day industrial employee, de Grazia states:

"Many of the moonlighting jobs are in the category of service trades—T.V. and radio fixing, house painting and restoring, kitchen appliance repairs, carpeting, etc. Those services are relatively expensive because of the high proportion of skilled labor they require. For many persons short of money, there seems to be two ways of handling these jobs; either leave home to become a beachcomber or do them yourself. The only safe course seems to be do-it-yourself. Yet the working man home from work is entitled to his rest. Presumably he should not be called upon to do other work, unpaid though it be.

"* * * classifying them as free time simply because they are unpaid would pass only the sleepyheads of an inefficient accounting system.

"* * * doing it oneself becomes a way of paying for the house by working longer hours. In many cases, too, the term should be 'unfinished home owner'. The new house when bought is incomplete, to reduce costs, and work must be done to building the carport, finish the attic or basement. When old homes are bought, it is the renovating that calls for home work.

"The bulk of the do-it-yourself market falls in the category of structural home improvements, home painting and wall papering, furniture making and furnishing, slip-covering, home gardening and ground maintenance, home dressmaking and sewing * * *

"Do-it-yourself work also extends to other parts of life—to shopping, for example. The customer

has to learn how the supermarkets classify produce, meat, dairy products, groceries and so forth —and then not only find the desired goods but sort them out properly for the checker who used to wait on customer but now merely corrects his sorting. * * * call it self-service or do-the-work-yourself, it all takes a lot more time and effort than having the grocer wait on you or the grocer's boy deliver your order as a result of a note or call. A similar system governs the sorting for collection of garbage and trash; it has become a do-it-yourself activity.

"* * * men put in on the average nearly five (4.8) hours a week in miscellaneous work (not hobbies) around the house.[7]

"Work time, if we use the calculations made earlier take up an average of ten hours and forty minutes a day (job about eight hours, journey to work one and a half hours, sphere of woman's work in housekeeping allocated for man, about 20 minutes, do-it-yourself work, about forty minutes, moonlighting, ten minutes), subsistence time takes up an average of ten and a half hours (sleep eight and a half, dressing, eating, cooking and shopping nearly two hours) (Table 3). For all the rest, including prayers, getting the car fixed, going to barber, dentist, shoemaker or laundry—items which are usually overlooked—we can make a low guess of twenty minutes per day * * *. If, in order to give the worker the benefit of the weekend, we calculate on the basis of a five day week, we shall have to say the job alone takes an average of nearly nine and a half hours a day. On work days he would have not two and a half hours of time free but only about one hour.[8]

---

[7] *Id.*, at pp. 75-77.

[8] *Id.*, at p. 96.

Because he has so very little free time and because he is usually satisfied with the way his union is run, most industrial workers do not attend union meetings except on the occasion of a meeting called to consider a new contract or to conduct a strike vote.[9]

For these reasons the union meeting is not available as a place where the union or other employees can, as a practical matter, expect to communicate with other workers. It, of course, is not a likely place for a new union, attempting to unseat the incumbent, to reach employees.

House to house canvassing over as wide an area as would be necessary to reach all of the Company's employees, even assuming they would be home when the visitor called, would be so expensive and time consuming as not to afford any real alternative avenue of communication.

Bulletin boards are censored by the employer and available only for the non-controversial (A 58, 59, 64-65, 94-95). With 2300 employees, rushing in and out before and after work, bulletin boards have proved ineffective even as a means of notifying all employees of times and places for union meetings (A 57, 62-64, 95). No substantial number of employees could stand and read any leaflet posted on a bulletin board. And, again, bulletin boards are not available to either em-

[9] Beverly Gilmer, *Industrial Psychology* (McGraw-Hill, 1961), p. 232, states: "There are typical large membership turnouts at meetings called to consider a new contract or to conduct a strike vote, but extremely small attendance at all other times. This should not be taken as a sign of indifference to the organization but rather as an indication that the union is perceived as performing a particular function for its members, and that as long as there is general satisfaction with the results the members have little reason to participate in its affairs."

ployees as distinguished from union or to a non-incumbent union. If employees were free to distribute on company property, leaflets could be placed on cars in parking lots or handed out at the time clocks, thus affording a cheap easy way of reaching all employees.

The Company's no-solicitation rule hence constitutes, to all intents and purposes, a denial of the right to distribute literature on Company property. The absence of any showing that the Company has any need for such a rule (Pet. App. C, pp. 19, 40), presents the Company's denial as a particularly arbitrary interference with Section 7 rights.

The National Labor Relations Board in the *Republic Aviation* case, in language quoted by this Court (324 U.S. 793, 801, n. 6), held that "in the plant on their own time" was "the very time and place uniquely appropriate and almost solely available to" employees for the exercise of Section 7 rights. The opinion in *Republic Aviation* expressly mentioned that in neither the Republic Aviation plant nor the Le Tourneau plant were there "any unusual conditions existing in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment." (324 U.S. at 801). This Court thereby implicitly rejected the argument that only where unusual conditions exist is the employer required to permit his property to be used as the locus for distribution of union literature. Nevertheless, we believe it relevant in this case to emphasize the absence of reasonable alternative means of reaching employees.

The absence of alternatives means that the Sixth Circuit's setting aside of the Board order amounted to a holding that the majority rule principle conferred

on the employer and the union the power to destroy for the term of the collective bargaining agreement the only effective method of communication which exists between employees *inter se* and the union and employees. If employees should desire to form or join another union during the term of this contract the only appropriate place in which to hand out leaflets is barred to them.

For the majority in any political election to pass a law barring distribution of literature in parks, streets, or at the doors of citizens, thereby impairing substantially the ability of the minority to organize in an attempt to become a majority, would violate the First Amendment. We believe that the National Labor Relations Act must be construed as not authorizing the union and the employer by collective bargaining agreement to deprive employees of their Section 7 right to distribute union literature on Company property.

## III.

**The receipt of a quid pro quo from the employer in return for waiving the right of employees to distribute on company property, if such quid pro quo could be inferred from, at most, acquiesced in an employer anti-distribution rule, does not serve to empower the union to bargain away Section 7 rights of employees.**

The court below in setting aside the Board's order adhered to its ruling in *Armco Steel Corp.* v. *N.L.R.B.*, 344 F.2d 625 (6th Cir. 1965). In that case, as one ground for refusing to enforce the Board's order, the Sixth Circuit presumed that "the union obtained from Armco a *quid pro quo* for its assent to the clause" and that the "parties to a contract cannot be restored to

their *status quo* when a clause is deleted from their contract without mutual consent" (344 F.2d at 625). In the instant case, where admittedly the parties did not negotiate with respect to the Union's waiving of the invalidity of any non-distribution rule (A 38-40) there was obviously no *quid pro quo* and no inability to restore the *status quo.*

In situations in which there is an actual *quid pro quo* for the union's waiver of the rights of employees, we would urge that the waiver was nonetheless beyond the collective bargaining powers of the bargaining representative and the employer. Rights of communication guaranteed by Section 7 are rights of employees which cannot be put up for sale by the bargaining representative. Just as First Amendment rights preserve political democracy, so the rights of communication guaranteed by Section 7 are essential to preserve free collective bargaining.

If an employer may buy from the incumbent union the right to suppress effective communication among its employees for the term of the contract, the antithesis of the industrial democracy contemplated by Congress results. The employees are deprived of the right to circulate written communications amongst their fellow workers in an effort to improve conditions, change officers or change unions. Convenient although the employer and incumbent union or incumbent officers of the incumbent union may find such an arrangement, it frustrates the rights which Congress believed workers should enjoy in order to achieve the objective of bargaining through freely chosen collective bargaining representatives.

## IV.

### This Court's approval of no-strike clauses affords no precedent for no-distribution clauses.

This Court in holding that a union may lawfully bargain collectively for a no-strike clause for the duration of a collective bargaining agreement, was careful to except from permissible waivers any which might interfere with the free selection of a collective bargaining representative. Thus, in *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 280 (1956), this Court stated:

> On the premise of fair representation, collective bargaining contracts frequently have included certain waivers of the employees' right to strike and of the employer's right to lockout to enforce their respective economic demands during the term of those contracts. Provided the selection of the bargaining representative remains free, such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules. Individuals violating such clauses appropriately lose their status as employees. (footnote omitted)

The Fifth Circuit in *N.L.R.B.* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968), distinguished the right to distribute literature from the right to strike in that the first related to their right to select a bargaining agent whereas the latter went merely to the pursuit of an economic advantage. The court stated (403 F.2d at 705):

> The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees

acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage.

* * *

* * * [T]he rationale of allowing waiver by the union disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse. Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative.

Similarly see *Collectively Bargained Waiver of Plant-Site Solicitation and Distribution,* 56 Iowa Law Rev. 152, 168-169 (October 1970).

We do not believe that a no-strike clause should properly be labeled as a "waiver." The word "waiver" assumes that but for the waiver the right would exist. This Court has held that the right to strike does not exist during the term of a collective bargaining agreement which provides for resolution of grievance by arbitration, even where there was no waiver of the right to strike and the collective bargaining agreement did not contain an express no-strike clause. *Teamsters Local* v. *Lucas Flour Co.,* 369 U.S. 95 (1962). This result was reached by recognizing that Congress viewed the stability of a collective bargaining agreement for a specified reasonable period of time, which it was the object of Congress to achieve, as the alternative to strikes. This Court has held that Congress

had as its object eliminating strikes during the period for which the parties were able to agree on terms and conditions of employment. Cf. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 237 (1938).

With respect to the right of communication between employees which Congress protected by Sections 7 and 8(a)(1), just the opposite is true. The exercise of these rights is consistent with the stabilization of relationships during the term of the collective bargaining agreement. Indeed, suppression of free expression of ideas between employees will tend to disrupt rather than stabilize. To paraphrase the language used by Mr. Justice Brandeis in his concurrring opinion in *Whitney* v. *California*, 274 U.S. 357, 375-376 (1927), which this Court quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) as the classic formulation of the dangers of suppressing communication:

> [I]t is hazardous to discourage thought, hope and imagination; * * * fear breeds repression, * * * repression breeds hate; * * * hate menaces stable [employment relations]; * * * the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.

## V.

### A no-distribution rule if valid and enforced literally would serve to entrench the incumbent bargaining representative, thereby destroying the Section 7 rights of employees.

The executing by an incumbent union of a collective bargaining agreement containing a prohibition against distribution by employees on company property on analysis amounts to a usurpation by the majority in an effort to preserve itself in power indefinitely. The

Board in its original *Gale Products* decision, 142 N.L.R.B. 1246, 1249 (1963) characterized such an agreement as an attempt by the incumbent union "to freeze out another union by treading on statutory rights of employees to engage in protected activities." The Fifth and Eighth Circuits have agreed with the Board that the incumbent union and the employer may not lawfully ban distribution on company property in support of another union. *N.L.R.B.* v. *Mid-States Metal Products Inc.*, 403 F.2d 702, 706 (5th Cir. 1968); *Machinists* v. *N.L.R.B.*, 415 F.2d 113, 116 (8th Cir. 1969).

We submit that the no-distribution rule negotiated by an incumbent union constitutes prohibited discrimination in favor of the majority and by adopting such a rule the employer violates Section 8(a)(1) as the Board here held (Pet. App. C, pp. 20-21).

## VI.

**The Board properly held that the right of employees to distribute on company property in favor of a challenging union must carry with it the right to employees to distribute in favor of the incumbent union.**

In *Machinists* v. *N.L.R.B.*, 415 F.2d 113, 116 (8th Cir. 1969), the Eighth Circuit agreed with the Board that the union and the employer had no power to agree on a no-distribution rule which would prohibit employees from distributing literature in support of a challenging union. But the Eighth Circuit held that the right of employees to distribute literature directed at changing representatives must be accompanied by the right of employees who opposed a change to distribute literature in support of the incumbent. The Board

in the instant case agreed that the Eighth Circuit had correctly construed the statute and accordingly ordered the Company to withdraw its rule barring distribution either in favor of or opposed to changing bargaining representatives or other matters related to the exercise by employees of their Section 7 rights. We submit that any other rule is one sided and unfair.

## CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should reverse the judgment below and remand with directions to enforce the order of the Board.

Respectfully submitted,

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D.C. 20036

RONALD H. JANETZKE
1361 Office Park Drive
Kettering, Ohio 45439

*Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Respondent*

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 72-1637

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

THE MAGNAVOX COMPANY OF TENNESSEE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## BRIEF FOR THE MAGNAVOX COMPANY OF TENNESSEE

GEORGE K. MCPHERSON, JR.
DANIEL M. SHEA
Attorneys for Respondent
1400 Fulton National Bank Building
Atlanta, Georgia 30303
404 — 521-3800

## INDEX


Page

QUESTION PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT ..... 4

I. The distribution of literature by employees on company property is not so fundamental that it cannot be contractually waived, and it was arbitrary and capricious for the Board to find otherwise under the facts and circumstances of this case ..... 4

II. The Board's decision in this case is in serious and direct conflict with the principles of freedom of the collective bargaining process and freedom of contract as well as the objectives of industrial stability and peace central to and underlying the entire act ..... 21

CONCLUSION ..... 30


## CITATIONS


Page

CASES:

*American Communication Association* v. *Douds*, 339 U.S. 382 (1950) ..... 20

*Armco Steel Corporation* v. *National Labor Relations Board*, 344 F.2d 621 (6th Cir., 1965) ..... 5, 17, 18, 25, 27

*Armco Steel Corporation*, 148 NLRB 1179 (1964) ..... 6

CITATIONS (Continued)

Page

*Brooks* v. *National Labor Relations Board*, 348 U.S. 96 (1954) ..... 22

*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) ..... 16

*Gale Products, Inc.*, 142 NLRB 1246 (1963), *enf. denied* 337 F.2d 390 (7th Cir., 1964) ..... 17, 22, 26

*General Motors Corporation*, 158 NLRB 1723 (1966) ..... 6, 17, 18

*H. K. Porter Company* v. *National Labor Relations Board*, 397 U.S. 99 (1970) .. 13, 16, 22, 24, 26, 27

*IAM, District 9*, 171 NLRB 234 (1968) ..... 6

*J. I. Case Company* v. *National Labor Relations Board*, 321 U.S. 332 (1944) ..... 21

*LeTourneau Company of Georgia*, 54 NLRB 1253 (1944), *enf. denied* 143 F.2d 67 (5th Cir., 1944) .. 14

*Local 174, Teamsters* v. *Lucas Flour Company*, 369 U.S. 95 (1962) ..... 18, 24

*Mason & Hanger-Silas Mason Company* v. *National Labor Relations Board*, 405 F.2d 1 (5th Cir., 1968) ..... 6, 7

*Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U.S. 270 (1956) ..... 20

*Medo Photo Supply Corporation* v. *National Labor Relations Board*, 321 U.S. 678 (1944) ..... 17

*Mid-States Metal Products, Inc.*, 156 NLRB 872 (1966) ..... 6, 7

CITATIONS (Continued)

Page

*National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395 (1952) .. 24

*National Labor Relations Board* v. *The Babcock & Wilcox Company*, 351 U.S. 105 (1956) .... 13, 24

*National Labor Relations Board* v. *Draper Corporation*, 145 F.2d 199 (4th Cir., 1944) ..... 21

*National Labor Relations Board* v. *Gale Products, Division of Outboard Marine Corporation*, 335 F.2d 390 (7th Cir., 1964) ..... 5, 10

*National Labor Relations Board* v. *Insurance Agents Union*, 361 U.S. 477 (1960) ..... 24

*National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir., 1968) ..... 6, 10

*National Labor Relations Board* v. *Spun-Jee Corporation*, 385 F.2d 379 (2d Cir., 1967) ..... 18

*National Labor Relations Board* v. *United Steelworkers of America (NuTone Inc.)*, 357 U.S. 357 (1958) ..... 5, 10, 11, 12, 16

*National Labor Relations Board* v. *Wooster, Division of Borg-Warner Corporation*, 356 U.S. 342 (1958) ..... 16

*Peyton Packing Company*, 49 NLRB 828 (1943), *enf'd* 142 F.2d 1009 (5th Cir., 1944) ..... 14

*Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17 (1954) ..... 21

CITATIONS (Continued)

Page

*Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793 (1945) .... 9, 12, 14

*Republic Aviation Corporation*, 51 NLRB 1186 (1943), *enf'd* 142 F.2d 193 (2d Cir., 1944) ..... 14

*Stoddard-Quirk Manufacturing Company*, 138 NLRB 615 (1962) ..... 9, 13, 14, 16

*Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) ..... 24

*United Aircraft Corporation* v. *National Labor Relations Board*, 440 F.2d 85 (2d Cir., 1971) .... 27

*United Steelworkers of America, AFL-CIO* v. *National Labor Relations Board*, 389 F.2d 295 (1967) ..... 24

*United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960) . 18, 24

*Walton Manufacturing Company*, 126 NLRB 697 (1960), *enf'd.* 289 F.2d 177 (5th Cir., 1961) .... 14, 15

*MISCELLANEOUS:*

Annotation, 88 L.Ed. 770 (1944) ..... 17

Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 University of Pennsylvania Law Review, 467 (1964) .... 24, 27

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

---

No. 72-1637

---

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

THE MAGNAVOX COMPANY OF TENNESSEE,
ET AL.,
Respondents.

---

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

# BRIEF FOR THE MAGNAVOX COMPANY OF TENNESSEE

---

## QUESTION PRESENTED

Whether the facts and circumstances of this case allow the duly certified and authorized bargaining representative to waive the right of employees whom it represents to distribute literature on Company property.

## STATEMENT

The Respondent adds to its earlier statement[1] the following: the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC[2] has consistently and without exception recognized and acquiesced in the Company's no-distribution policy since its initial certification in late 1954. (Pet. App. 36-37; A. 53-54, 56, 65, 70-73, 77-78, 81, 95, 99-100, 103, 128).[3] The policy or rule prohibited all distribution of literature on Company property by any persons, including its employees. (A. 30-31, 57-58). Throughout the years, the Union has frequently distributed handbills to the employees as they were coming to or leaving work. The distributors, however, have always stood at the gates off Company property to make their distributions; and there is no evidence that their efforts were never less than completely successful using this method of distribution. (A. 56, 65, 77-78, 99, 103). In addition, the Company has maintained a solicitation rule allowing employees full freedom of discussion during non-work time in all areas of the plant. (A. 127, 136).

Throughout this period no grievance has ever been filed protesting the Company's no-distribution policy nor has the Union ever attempted to change the Company's rule through the negotiation process, although several contracts have been negotiated. (Pet. App. 33, 36-37, 57, 97).

---

[1] Opposition to certiorari, pp. 3-5.
[2] Hereinafter referred to as the "IUE" or "Union".
[3] "Pet. App." refers to the Appendix of the Petition for Certiorari. "A." refers to the separate Appendix to the Briefs.

The Company offered to prove that there was no organizational drive taking place, or rival-union activity at the Company at the time the unfair labor practice charge was filed. The offer of proof was rejected, but the trial examiner assumed that the situation did not exist. (A. 33-35).

The National Labor Relations Board[4] found that the Union had in fact waived the right of all bargaining unit members to distribute literature for any purpose on the Company's premises. The Board, however, abandoning its existing precedent in *Gale Products, Inc.*,[5] concluded that the incumbent union's waiver was not binding upon any of its bargaining unit members insofar as it permitted the Company to prohibit the employees from distributing literature on behalf of either the incumbent or a rival labor organization "which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their Section 7 rights." (Footnote omitted) (Pet. App. C, p. 24).

The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board order holding that a "bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here." (Pet. App. A, p. 15)

---

[4]Hereinafter referred to as the "Board" or "Petitioner".
[5]142 NLRB 1246 (1963), *enf. denied* 337 F.2d 390 (7th Cir., 1964).

## ARGUMENT

The facts and circumstances of this case permit the waiver of employee distribution of literature on Company property by the duly certified and authorized collective bargaining representative and the Company. The Court is presented in this case with uncontradicted facts showing an absence of organizational activity, free ability of employees to solicit their fellow workers, and totally effective, although inconvenient, alternative means of distribution. In such circumstances, the Board's injecting itself into the collective bargaining process, and the mechanistic application by it of rules derived from and applicable to unilaterally imposed no-distribution rules, together with the relief sought by the Board, undermines and is counter-productive to the National Labor Relations Act's[6] central purpose of industrial peace and freedom of contract.

### I. The Distribution Of Literature By Employees On Company Property Is Not So Fundamental That It Cannot Be Contractually Waived, And It Was Arbitrary And Capricious For The Board To Find Otherwise Under The Facts And Circumstances Of This Case.

There are many means of oral and written communication which allow employees to effectively communicate with each other to exercise their rights under Section 7 of the Act. Distribution of literature on company

---

[6]Hereinafter referred to as the "Act".

property is therefore only one means available to employees for self-organization. The United States Court of Appeals for the Seventh Circuit recognized this when it denied enforcement to the Board's order in the *Gale Products*[7] case:

> The contract provisions here assailed did not strip the employees of fundamental rights guaranteed by the Act. The provisions preclude only a convenient — albeit a most effective — way of their exercise. Employees are free to forego their qualified rights to on the premises organizational activity in favor of the available alternatives thereto. 337 F.2d 390, 392.

Because distribution of literature is only one means of exercising the end of self-organization and not an end in itself, the Company submits that the various "available alternatives" become highly relevant and must be examined before determining that the waiver of one has impaired organizational rights under Section 7 of the Act; and it becomes the special duty of the Board to appraise carefully in the diverse circumstances of each case whether the employee rights have been truly diminished. *National Labor Relations Board* v. *United Steelworkers of America (Nutone, Inc.)*, 357 U.S. 357, 362-363 (1958); *Armco Steel Corporation* v. *National Labor Relations Board*, 344 F.2d 621 (6th Cir., 1965).

---

[7] *National Labor Relations Board* v. *Gale Products, Division of Outboard Marine Corporation*, 337 F.2d 390, 392 (7th Cir., 1964).

Prior to its decision in the instant case, Board doctrine has recognized that the distribution of literature was not so fundamental an act for it had held that an incumbent union could effectively waive the right of employees to distribute literature in its behalf on company premises. The Board had refused, however, to give effect to an agreement between an incumbent union and an employer to the extent that that agreement proscribed distribution by employees in behalf of a rival labor organization so long as the distribution was confined to non-work time and non-work areas. *Gale Products, supra,* 142 NLRB 1246; *Armco Steel Corp.*, 148 NLRB 1179 (1964); *Mid-States Metal Products, Inc.*, 156 NLRB 872 (1966); *General Motors Corp.*, 158 NLRB 1723 (1966); *IAM, District 9*, 171 NLRB 234 (1968).

Of the United States Circuit Courts of Appeal that have confronted this doctrine only the Fifth Circuit has held that the right was "too fundamental to be contracted away by the union as was done here." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702, 706 (5th Cir., 1968). However, less than a month later the Fifth Circuit altered its position by its holding in *Mason & Hanger-Silas Mason Company* v. *National Labor Relations Board*, 405 F.2d 1 (5th Cir., 1968). There, as in this case, no organizational activity was taking place. The Fifth Circuit distinguished its ruling in *Mid-States* on this very point, holding that:

> ...The specific Section 7 rights involved in *Mid-States* related to the selection or non-se-

> lection of a bargaining agent. The instant case, on the other hand, concerns activity for the purpose of economic advantage. Consistent with the rationale of *Mid-States*, we feel that the interests of contractual stability sufficiently outweighs considerations of individual rights in this case so as to make appropriate, where applicable, the enforcement of the contractual prohibition against solicitation. 405 F.2d 1, 5.

Under the facts of the instant case the Petitioner's heavy reliance (Board brief, pp. 8, 12, 13, 14, 17) on the Fifth Circuit's ruling in *Mid-States*, is unjustified in view of that court's later holding in *Mason*, which supports the basic concept that means of employee communication are not so fundamental that they cannot be waived.

In the present case, the Board has ruled and in its brief suggests to the Court that the contractual prohibition against distribution is an "unreasonable impediment" to self organization; constituted an "unacceptable abridgement of the basic statutory policy of protecting employees"; and that the Company is guilty of "flagrant employer interference" with the right of employees to select their own bargaining representative. (Board brief, pp. 7, 9, 13). Such an attack would certainly indicate that severe consequences have resulted from the employer rule. Yet, curiously, in the instant case there is not the slightest evidence to even suggest that the no-distribution policy of the Company has ever been applied in a discriminatory manner so

as to deprive any employees in the bargaining unit of their right to support or select a labor organization of their own choosing. Further, and even more significantly, there is no evidence *at all*, nor any finding, in the Board's decision that the Employer's no-distribution policy did in fact impair or hinder the opportunity of employees to effectively support the labor organization of their choice. Not only does the Board in its decision fail to demonstrate that employees' Section 7 rights were seriously impaired, but its decision fails to rationally demonstrate that employee rights were interfered with in any way.*

Probably the most notable and most conspicuous feature of the Board's decision is the total absence of any analysis whatever of the effectiveness of alternative means or channels of communication available to employees. The Board freely acknowledges this in its Brief. (Board brief, p. 17). Perhaps the underlying reason for this startling absence of analysis can be found in the fact that the General Counsel's own witnesses conclusively established that the means of communication available to employees other than on-premises distribution were entirely effective. That testimony clearly showed that distribution at the entrances to and exits from the employer's property was just as effective a means of communication as would be on-the-premises distribution. For example, James Kelley who had been an employee of the Company in ex-

*In fact, the charge arose only after the Union's insistence on making a distribution in the plant several weeks after the Union president learned of this alleged right at a Union District Counsel meeting. (A. 96-97).

cess of nineteen years, testified that he had on numerous occasions distributed literature in behalf of the IUE at points of ingress to the Employer's premises Mr. Kelley unequivocally stated that, in making these distributions, he was able to distribute his material to every single vehicle entering or leaving the employer's premises. (A. 103). As recognized by the Board itself, effective distribution depends only upon receipt of the material being distributed, and not to any extent upon the location at which it is received.

> The distinguishing characteristic of literature as contrasted with oral solicitation — and a distinction to often overlooked — is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. *Hence the purpose is satisfied so long as it is received.* (Emphasis added.) (Footnote omitted.) *Stoddard-Quirk Manufacturing Company*, 138 NLRB 615, 620 (1962).*

Similarly, employees are not entitled to distribute on Company premises simply because the Employer delivers its newspapers in the plant. This Court has held

---

*In *Stoddard-Quirk*, the Board singled out the plant entrances or exits as an appropriate place for distribution of literature. 138 NLRB 615, 620. By the same token, the heavy reliance by the Board as the plant being the uniquely appropriate place for distribution (Board brief, pp. 7, 14) is misplaced. The Board in *Stoddard-Quirk*, in discussing this Court's decision in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793 (1945), clearly indicated that the unique and appropriate character of the plant applied to solicitation, not distribution of literature. 138 NLRB 615, 620. See above quote.

that employees are not entitled to use a medium of communication simply because the employer is using it. *NuTone, Inc., supra,* 357 U.S. 357, 364.

In addition to the availability of effective distribution opportunities at entrances to and exits from the employer's property, it is important to note that in the instant case, unlike the factual situations existing in *National Labor Relations Board* v. *Gale Products, Division of Outboard Marine Corporation, supra,* and *National Labor Relations Board* v. *Mid-States Metal Products, Inc., supra,* where the employers restricted *both* distribution and solicitation rights, the Employer in the instant case imposes no restriction whatever upon solicitation by employees during non-work time.[10] Employees are perfectly free to discuss self-organization among themselves during their non-work time anywhere on Company property, including both work and non-work areas. But such unrestricted ability to fully discuss Section 7 rights anywhere on Company property — the place cited by the Board as uniquely appropriate for employees to obtain information (Board brief, pp. 7, 14) — is totally ignored by the Board while it maintains at the same time that the basis of their finding is freedom of employees '"... *to discuss self-organization among themselves* [*in the plant*] . . .'" (Emphasis added.) (Board brief, p. 17). There simply is no restriction on the employees' right or ability to do this.

---

[10]The Board brief appears, incorrectly, to contend that the employer bans in-plant solicitation. (Board brief, pp. 14-15, 17).

Finally, although the waiver in this case cut off on-premises distribution of literature to employees, this Court recognized in a similar vein:

> Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances be protected in the use of every possible means of reaching the minds of individual workers ... *NuTone, Inc., supra,* 357 U.S. 357, 364.

It is not possible under the facts and circumstances of this case to reasonably conclude that Respondent's enforcement of the no-distribution agreement seriously impairs effective communication with its employees, or thereby hampers Section 7 rights. The effectiveness of alternative channels of communication and their non-discriminatory application neutralize any so-called benefits the Union may have received assuming, as the Board does (Board brief, p. 14), it bargained away this right out of its own self interest. Because of these alternative means available to employees, it is clear under the facts and circumstances of this case neither the incumbent Union, nor the Employer could — even if they wanted to — freeze out another union by such a waiver.

In failing to consider the effectiveness of alternative methods of communication the Board, in effect, did not attempt to make a showing that the no-distribution rule truly diminished the ability of employees to or-

ganize which this Court has pointed out is a vital consideration in determining the validity of such a rule. *NuTone, Inc., supra,* 357 U.S. 357, 363. The Board answers this stating that it need not consider alternative channels of employee communication, "since there is no evidence that the rule was needed to maintain production or discipline." (Board brief, p. 9) Citing *Republic Aviation, supra,* the Board stated "Such a ban 'must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline' (*id.* at 803-804, n. 10)". (Board brief, p. 10).

However, this only begs the question of actual impairment of Section 7 rights, and further, is not in point. Although the Court has sanctioned the Board's presumption rules in *Republic Aviation, supra,* 324 U.S. 793, 804, the Petitioner gave no justification for imposing its presumption rule which arose from cases involving *unilaterally* imposed no-distribution or no-solicitation rules to this case which involved a contractually agreed-to or *bilaterally* accepted no-distribution rule. While the validity of unilaterally imposed rules involves an examination of and balancing employees' statutory rights of self-organization against the employer's property rights such as control of production and discipline, the validity of a bargained-for waiver involves the balancing of potentially conflicting portions of the National Labor Relations Act, *i.e.,* employee rights and freedom of contract. Consequently, it is incorrect in this case to discuss a bargained-for waiver in

terms of the Company's need to maintain production and discipline in the plant. Freedom of contract is a right fundamental to the Act. *H. K. Porter Company* v. *National Labor Relations Board*, 397 U.S. 99, 108 (1970).[11] Thus, both this right and the right of employees under Section 7 must be examined to determine if one conflicts with the other, for neither right should be abridged unnecessarily; and where there is no necessary conflict neither right should be abridged. *National Labor Relations Board* v. *The Babcock & Wilcox Company*, 351 U.S. 105, 112 (1956); *Stoddard-Quirk, supra*, 138 NLRB 615, 617.[12] Where, as here, it has been shown that alternate means of communication are available and totally effective, there is no conflict between the fundamental rights involved, and the Company together with the collective bargaining representative of the employees should have the ability to contractually waive distribution rights on company premises.

In applying its presumption rule, the Board, after proof of the existence of a company's no-distribution rule presumes the ultimate fact that such a rule is invalid. However, as this Court has stated, there must be a rational relationship or connection between the fact proved and the ultimate fact presumed. See, *e.g.*, *Republic Aviation*, 324 U.S. 793, 804-805 n. 14. The Company submits that there was no such relationship here.

---

[11] See further discussion of freedom of contract, *infra*, beginning at page 21.

[12] Although the Court in *Babcock & Wilcox* and the Board in *Stoddard-Quirk* discussed the conflict between employee rights and employer property rights, its language is even more applicable in this case when differing portions of the Act itself are in question rather than employer property rights.

Categorically, the fact proved in the cases where the Board developed the presumption was based on (1) an atmosphere of organizational activity and (2) unilateral no-distribution prohibitions. It was under these circumstances that the Board founded its presumption of invalidity rules. Experience taught the Board that with these circumstances present, workers' organization rights often were impaired. Thus, from these fact patterns arose the inference of invalidity. By comparison, those facts are absent here. As a result, the underlying rational relationship between the fact and the presumption is absent. As such, the presumption rule was arbitrarily applied in this case, there being no relationship shown to the facts upon which the rule was founded. *Republic Aviation Corporation* v. *National Labor Relations Board, supra; Republic Aviation Corporation,* 51 NLRB 1186 (1943), *enf'd* 142 F.2d 193 (2d Cir., 1944); *LeTourneau Company of Georgia,* 54 NLRB 1253 (1944), *enf. denied* 143 F.2d 67 (5th Cir., 1944); *Peyton Packing Company,* 49 NLRB 828, 843-844 (1943), *enf'd* 142 F.2d 1009 (5th Cir., 1944); *Walton Manufacturing Company,* 126 NLRB 697 (1960), *enf'd,* 289 F.2d 177 (5th Cir., 1961); *Stoddard-Quirk, supra.*[13]

---

[13]The first case to adopt the presumption rule was *Peyton Packing* where the Board held:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during lunch or rest periods, is an employee's time to use as he wishes without unreasonable re-

By the arbitrary and capricious application of its presumption rule here, the Board has erroneously excluded relevant factors from its consideration and in

---

straint although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization, and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. *Id.*, at 843-844.

The presumptions were summarized in *Walton* as follows:

1. No-solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization, and are therefore presumptively invalid both as to their promulgation and enforcement; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline (footnote omitted).

2. No-solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose; (Footnote omitted) and are presumptively valid as to their enforcement, in the absence of evidence that the rule was unfairly applied. (Footnote omitted)

3. No-solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature by non-employee union organizers at any time on the employer's property are presumptively valid, in the absence of a showing that the union cannot reasonably reach the employees with its message in any other way, or a showing that the employers notice discriminates against the union by allowing other solicitation or distribution. (Footnote omitted.). *Id.*, at 697-698.

doing so has unnecessarily abridged a fundamental right by mechanically accommodating another. *cf., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

In a discussion concerning the accommodation of employer and employees rights when organizational activity is taking place, the Board itself stated:

> It follows, we believe, that the formulation of generalized rules in this area must be undertaken with caution for, patently, differing fact situations call for differing accommodations. The Supreme Court in the most recent of its utterances in this field pointedly reminded us in a closely related context that 'mechanical answers' will not avail 'for the solution of this non-mechanical complex problem in labor management relations.' *Stoddard-Quirk*, 138 NLRB 615, 617, citing *NuTone, Inc., supra*, 357 U.S. 357, 364.

In view of this admonition which is as equally applicable in this case, the Company submits that the application here of Board rules derived from unilateral prohibition cases is in error, and submits that the proper rule to be applied in cases involving bilateral prohibition rules is that such terms should be ruled presumptively valid as are other terms of the collective bargaining agreement, unless illegal, or expressly in violation of other sections of the Act. *H. K. Porter Company, supra*, 397 U.S. 99, 108 n. 6; *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*,

356 U.S. 342, 360 (1958); *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678 (1944); *Armco Steel Corporation, supra*, 344 F.2d 621, 624; *Gale Products, supra*, 142 NLRB 1246, 1251-1252 (dissent). See Annot., 88 L.Ed. 770, 779-783 (1944). Such a test was indicated by the Board itself where, in discussing a bilateral rule,

> . . . [it] recognized the salutary purpose of refusing to disturb 'concessions yielded by either party through the processes of collective bargaining even where such concession may infringe upon rights guaranteed employees under Section 7 of the Act.' But we also pointed out that the validity of a particular concession or a waiver must depend upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver, or would unduly hamper the employees in exercising their basic rights under the Act ... *General Motors Corporation*, 158 NLRB 1723, 1726, citing *Gale Products, supra*, 142 NLRB 1246, 1248-1249.

Only through the application of such a test can the Board properly accommodate employee rights under Section 7 of the Act, and the equally fundamental freedom of contract guaranteed to the employees' bargaining representative and the company. Such accommodation can never be made through the imposition of rules of presumption which do not measure the validity of a bargained-for waiver of distribution in terms of

these rights. Only through such an accommodation can the Board properly determine whether the waiver "would unduly hamper the employees in exercising their basic rights under the Act." *General Motors*, id at 1726.

The Board readily acknowledges that there are many Section 7 rights which are waivable. See, *e.g.*, *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960) — waiver of the right to strike. *Local 174, Teamsters* v. *Lucas Flour Company*, 369 U.S. 95 (1962) — implied waiver of the right to strike resulting from a binding arbitration commitment for settlement of disputes. *National Labor Relations Board* v. *Spun-Jee Corp.*, 385 F.2d 379 (2d Cir., 1967) — implied waiver of the right of employees to bargain collectively through their chosen representative concerning the effects of a plant closure or removal. See also, *Armco Steel Corporation*, *supra*, 344 F.2d 621, 624.

The question therefore becomes: is there justification in the Act itself for finding that, while numerous other important rights of employees protected by Section 7 may be waived, distribution rights secured by that same Section 7 may not be waived by the statutorily authorized bargaining representative: the Employer respectfully submits that there is no basis whatever to be found in the Act for such distinction. Section 7 of the Act neither contains nor even suggests gradations of the rights secured thereunder. As shown by the above cases, the principle that rights guaranteed employees under Section 7 of the Act may in fact be

waived by the employees' bargaining representative with or without the consent of the bargaining unit members, is firmly settled. In fact, those important rights may be waived by the collective bargaining representative over the objections of a majority of the employees being represented. In addition, many of these rights are *expressly* protected by Section 7; it can hardly be doubted that a right only *inferentially* secured by Section 7, such as distribution of literature may not be waived by the incumbent and statutorily selected bargaining representative.

However, the Board argues that such rights are distinguishable from the right to distribute literature. The Board justifies this distinction by arguing that "[w]aiver of these [other] rights is permitted because they depend on collective action for their effectiveness, and the union is the arbiter of such action." (Board brief, p. 12). However, the right of employees to organize also depends on collective action. Under the Act and Board procedure,[14] in order for employees to choose or change a bargaining representative, they must act in concert with one another; a certain percentage of the employees in the appropriate unit to be represented must petition for representation and if an election is held by the Board, a majority of those employees voting must vote for representation. Alternatively, the Board argues that a waiver of distribution rights is permissible but only "in the economic area. . ." (Board brief, p. 10). But there is no evidence in this case to suggest that the Union leaflet

[14]See opposition to certiorari, pp. 2-3.

sought to be distributed was not an attempt to seek economic advantage. The Board admits as much in its Brief. (Board brief, p. 10). Moreover, to distinguish economic gain from organizational activity is a distinction without a difference in this case since in either event "the selection of the bargaining representative remains free," *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U.S. 270, 280 (1956), and in either event adds to the economic power of the Union to gain further advantages from the employer. *American Communication Association* v. *Douds*, 339 U.S. 382, 401 (1950).

The decisions of the Courts and Board on the subject of unilateral and bilateral no-distribution rules together with an analysis of the facts and circumstances of this case warrants the conclusion that the Board should have *at a very minimum* examined the availability of effective alternate means of communication available. Certainly, it is most difficult to accept the Board's bare unsupported assertion that on-the-premises distribution rights are so fundamental and imperative to employees that an important part of the contractual agreement of the incumbent Union and the Employer must be totally nullified when the Board has not in any manner demonstrated that these individual interests are impaired by or sufficiently outweigh considerations of freedom of contract that have resulted in the no-distribution agreement.

## II. The Board's Decision In This Case Is In Serious And Direct Conflict With The Principles Of Freedom Of The Collective Bargaining Process And Freedom Of Contract As Well As The Objectives Of Industrial Stability And Peace Central To And Underlying The Entire Act.

Section 9(a) of the Act prescribes that the bargaining representative is to be the exclusive representative of all of the employees within the bargaining unit.[15] This is true even though certain of those employees voted against representation by the particular union involved, and even though they may disagree with and object to principles governing their working conditions agreed upon by the union and their employer. See, *e.g.*, *J. I. Case Company* v. *National Labor Relations Board*, 321 U.S. 332, 339 (1944); *National Labor Relations Board* v. *Draper Corporation*, 145 F.2d 199, 203 (4th Cir., 1944). As stated by this Court in the *J. I. Case Company*, *supra*, decision:

> The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules .... 321 U.S. 332, 339.

The Court's admonition that there is to be no discrimination within the bargaining unit is especially true of discrimination based on union affiliation. *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17, 45 (1954).

---

[15] 29 U.S.C. §159(a) (1964).

Thus, under Section 9 of the Act, the collective bargaining representative represents all employees including dissident as well as those loyal to the incumbent. This basic tenet was recently reiterated by the Supreme Court in *H. K. Porter Company, supra*, 397 U.S. 99, 108 n. 6:

> [T]he employer is not free to choose any employee representative he wants, and the representative designated by the majority of the employees represents the minority as well.

The authority conferred upon a labor organization accorded representation rights under Section 9 of the Act extends even beyond these principles. The Board, with the approval of the courts, has consistently held that a union, once elected by employees under the procedures specified in the Act, is entitled to function as those employees' representative for a reasonable period of time, even though, following the union selection, it has lost the support of a majority of the employees in the bargaining unit. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96 (1954). As the statutorily designated representative of the employees, the union may, contrary to the wishes of a majority of the employees in a bargaining unit, represent the employees to the extent of entering into a contract with the employer which controls and governs every aspect of the wages, hours, and working conditions of all employees in the bargaining unit. *Brooks, supra.*

It has been the Board in its decisions beginning with *Gale Products, supra*, through the present case, that

has divided employees into two classes — those dissident and those loyal to the incumbent bargaining representative. Here, the Board for the first time has held that a statutorily designated bargaining agent may contractually waive the right of its unit members to distribute on company property, presumably receiving a *quid pro quo* in return for that waiver which results in benefit to its unit members, and thereafter completely ignore and repudiate its contractual commitment while leaving the Employer bound to abide by and honor the concession which it made in order to gain the union's assent to a no-distribution policy. Under the Board's decision, despite the agreement of the employees' representative and the Employer to the contrary, unit members are perfectly free to distribute literature on company property not only in behalf of rival unions, but also in behalf of the incumbent Union which was an actual party to the contractual commitment that no such distribution by employees it represented would be permitted. Such an interpretation of the Act directly undermines the authority of a collective bargaining representative to make decisive and binding commitments on behalf of the employees for whom it speaks, and at the same time undermines the fundamental tenet of freedom of contract by substituting the Board's judgment for that of the contracting parties.

As stated by one commentator, "among the many competing goals of national labor policy, two have been frequently proclaimed and staunchly defended, almost but never quite to death, by the Supreme Court of the United States. One is industrial peace; . . . the other

is freedom of contract, . . . — collective contract, to be sure." (Footnotes omitted)[18] This Court in its recent ruling that the Board was without power to compel an employer and a union to agree to a substantive term in a collective bargaining agreement, held that freedom of contract is not only a fundamental principle of the Act, but recognized that "the National Labor Relations Act is grounded on the premise of freedom of contract." *H. K. Porter, supra,* citing *United Steelworkers of America, AFL-CIO* v. *National Labor Relations Board,* 389 F.2d 295, 300 (1967).

In addition, the Board may not interfere with the parties' freedom of contract except when a clause in the agreement violates a specific statute and is illegal. *Infra,* pp. 16-17. Although the Company recognizes that such limitations are placed on the parties' freedom of contract just as limitations are placed on employee rights of self-organization, *Republic Aviation, supra,* 324 U.S. 793, 797, 798, the Company maintains that where these potentially conflicting rights can be accommodated without either being subordinated to the other such as in this case, it was unnecessary and erroneous for the Board to step in and abridge the Company and Union's freedom of collective bargaining. *Babcock & Wilcox Company, supra,* 351 U.S. 105, 112.

---

[18] Wellington, *Freedom of Contract and the Collective Bargaining Agreement,* 112 Univ. of Pennsylvania Law Review, 467 (1964); citing *Local 174, Teamsters* v. *Lucas Flour Company, supra; United Steelworkers* v. *Warrior and Gulf Navigation Company, supra; National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477 (1960); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395 (1952).

The paramount importance of freedom of contract in the scheme of the Act was specifically noted by the United States Court of Appeals for the Sixth Circuit in its refusal to enforce a Board order finding an employer guilty of violating Section 8(a)(1) of the Act by its enforcement of an agreement with the incumbent union that bargaining unit employees would not distribute literature on company premises. In that case, the court stated:

> Freedom of contract is perhaps one of the most important rights enjoyed by labor unions and employers. The Board has no power to sit in interference with the exercise of that right or to sit in judgment in the wisdom of substantive contract provisions. *It may interfere only when a clause violates a specific statute and it is illegal. . . . The Board has not pointed out any specific provision of the Act which is violated by the no-distribution clause.*
>
> • • •
>
> *Neither the union nor employer are required to justify for the Board their insistence on particular subjects to be embodied in an agreement so long as they are not illegal.* (Emphasis added) *Armco Steel Corporation, supra,* 344 F.2d 621, 624.

In rejecting the Board's finding that an incumbent union lacked the authority to waive solicitation and distribution rights of employees otherwise protected by Section 7 of the Act, the United States Court of Appeals for the Seventh Circuit expressed these same concerns:

> The 'desirability' of collective bargaining contract provisions from the standpoint of either the employees or the employer is not the measure of their validity. Moreover, the arrangement here involved is conducive to the stabilization of labor relations during the contract period and thus in harmony with a prime object of the Act. *Gale Products, supra,* 337 F.2d 390, 392.

The impropriety of Board interference with freedom of contract was also recently reiterated by this Court in *H. K. Porter Company:*

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. . . . But, it was recognized from the beginning that an agreement might in some cases be impossible, and it was never intended that the government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.
>
> * * *
>
> Notwithstanding this language of the court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make. . . .
>
> * * *

> The Board's remedial powers under Section 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. *H. K. Porter Company, supra*, 397 U.S. 99, 103-108.

Finally, "even if government were indeed wiser than the parties, the cost of substituting government decision-making for private decision-making should not be ignored by a society that depends, as ours does, upon plural power centers to sustain its democracy." (Footnote omitted.) *Wellington, supra*, at 473.

Another fundamental principle inherent in the very structure of the Act is the importance of not disturbing the actual agreement of the parties. In *United Aircraft Corporation* v. *National Labor Relations Board*, 440 F.2d 85, 96 (2d Cir., 1971), for example, the court noted: "The company probably considered the no-solicitation ban to be an important bargaining objective, and the agreement should not be lightly overturned." This same reasoning was emphasized by the Sixth Circuit in refusing enforcement of the Board's order in *Armco Steel Corporation*:

> Presumably the union obtained from Armco a *quid pro quo* for its assent to the clause. The parties to a contract cannot be restored to their status quo when that clause is deleted from their contract without mutual consent. *Armco Steel Corporation, supra*, 344 F.2d 621, 625.

As the court decisions mentioned hereinabove clearly recognize and demonstrate, the essential purpose of the Act is the promotion of industrial peace and stability. The primary means for obtainment of these objectives envisioned by the Act are freedom of the collective bargaining process and enforceability of agreements between an employer and labor organizations reached through that process. The Board's decision in this case directly undermines those policies.

Even aside from this deleterious effect of the Board's decision in the instant case the Company submits that there are yet further compelling reasons demonstrating that the Board's decision will inevitably and certainly promote industrial strife and instability in contravention of the express purpose of the Act:

Under the Board's present decision, as under its prior decisions on the issue here presented, disenchanted employees would be permitted to distribute literature in behalf of rival unions throughout the lives of the collective bargaining agreements from the very inceptions of those agreements. Thus, although the employees covered by a three year contract may not be in a position to petition for a change in or removal of their bargaining representative for a number of years, they may nevertheless, contrary to the specific agreement of the employer and the union, continually stir up animosity and instability during the entire lifetime of the contract.

Moreover, under the Board's new policy as annunciated in the present case, employees supporting the

very union that agreed to the no-distribution policy would be able to totally ignore that agreement and distribute literature in answer to the claims of employees supporting rival labor organizations. Thus, most probably, an atmosphere of claim and counterclaim, constant friction, internecine struggle and the very antithesis of industrial stability and peace may not only be permitted but also promoted, all contrary to the agreement of the incumbent union and the employer.

In addition to the tension that this decision will most probably create, further problems are caused where, in an attempt to minimize its ruling, the Board would permit the Company to enforce its agreement with the union to prescribe distribution of "institutional" material on its property by employees. Rather than being helpful, such a ruling only lends further instability to the Board's decision by leaving the Company completely on its own to resolve the rather perplexing question of what constitutes "institutional" as opposed to other types of union literature identified by the Board's broad and nebulous labels. Accordingly, should the Board's order be enforced by this Court, the Company acts completely at its peril in prohibiting the distribution of any literature whatsoever on its property, facing a contempt citation should it mistakenly determine literature to be "institutional" which, through the application of some unknown formula, is later found to be related to Section 7 rights of employees. The totally unworkable and impractical nature of the distinctions drawn and categories of literature established by the Board in this case is readily apparent when reference

is made to a basic and simple illustration. For example, may a union convert literature otherwise "institutional" into literature related to Section 7 rights by merely adding a notation at the bottom of that literature reading: "Be sure to attend the meeting this Friday" or "Join the union today"?

In summary, the primacy of the fundamental tenets of freedom of contract and enforceability of the agreement of the parties, both of which are designed to promote and foster industrial peace and stability are undermined in this case. The Board order, depriving the employer of its *quid pro quo* derived through the collective bargaining process, is wholly without foundation in the Act, contravenes important and fundamental objectives of that Act, and, accordingly should be denied enforcement.

## CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the judgment of the court of appeals should be affirmed.

Respectfully submitted this 19th day of December, 1973.

George K. McPherson, Jr.
Daniel M. Shea
Attorneys for Respondent,
The Magnavox Company of
Tennessee
1400 Fulton National Bank Building
Atlanta, Georgia 30303
404/521-3800

SUPREME COURT, U. S.

FILED

JAN 11 1974

No. 72-1637

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## REPLY BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, RESPONDENT

---

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D.C. 20036

RONALD H. JANETZKE
1361 Office Park Drive
Kettering, Ohio 45439

*Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Respondent*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## INDEX


Page

ARGUMENT ..... 1

CONCLUSION ..... 15


## CITATIONS

CASES:


Accardi v. Pennsylvania R.R. Co., 383 U.S. 225 ..... 10
Armco Steel Corp. v. NLRB, 344 F.2d 621 (C.A. 6) .. 10
Babcock & Wilcox v. Labor Board, 351 U.S. 105 ..... 6
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697..3, 7, 10, 11
C & S Industries, 158 NLRB 454 ..... 9
Carpenters' Union v. Labor Board, 357 U.S. 93 ..... 8
Consolidated Edison v. Labor Board, 305 U.S. 187 ... 8
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 ..... 10
Ford Motor Co. v. Huffman, 345 U.S. 330 ..... 10
Ford Motor Co. v. United States, 405 U.S. 562 ..... 5
Garment Workers v. Labor Board, 366 U.S. 731 ..... 8
Grayned v. City of Rockford, 408 U.S. 104 .....13, 14
International Ass'n. of Mach. & A. Wkrs. Dist. No. 9 v. NLRB, 415 F.2d 113 (C.A. 8) ..... 12
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 ..... 5
Labor Board v. American Nat'l. Ins. Co., 343 U.S. 395 8, 9, 11
Labor Board v. Erie Resistor Corp., 373 U.S. 221 .... 9
Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 ..... 4
Labor Board v. Le Tourneau Co., 324 U.S. 783....1, 2, 3, 5, 7,13
Labor Board v. Rockaway News, 345 U.S. 71 .....8, 14
Labor Board v. United Steelworkers, 357 U.S. 356 ... 6
Lear v. Adkins, 395 U.S. 653 ..... 4
Marsh v. Alabama, 326 U.S. 501 ..... 5
Mastro Plastics Corp. v. Labor Board, 350 U.S. 270 ..8, 10
Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356 ..... 4
NLRB v. Burnup & Sims, 379 U.S. 21 ..... 4

Page

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 ..... 4
NLRB v. Spun-Jee Corp., 385 F.2d 379 (C.A. 2) ..... 11
NLRB v. United Aircraft Corp., Pratt & Whitney Air Div., 324 F.2d 128 (C.A. 2), cert. denied 376 U.S. 951 ..... 6
Norfolk & Western R. Co. v. Nemitz, 404 U.S. 37 ..... 14
Porter Co. v. NLRB, 397 U.S. 99 ..... 6
Radio Officers v. Labor Board, 347 U.S. 17 .....9, 10
Republic Aviation Corp. v. Labor Board, 324 U.S. 793 1, 4
Schneider v. State, 308 U.S. 147 ..... 5
Schulte v. Gangi, 328 U.S. 108 ..... 4
Thomas v. Collins, 323 U.S. 516 ..... 5, 7
United Aircraft Corp. v. NLRB, 440 F.2d 85 ..... 11
United Mine Workers v. Pennington, 381 U.S. 657 ... 7
Wallace Corp. v. Labor Board, 323 U.S. 248 ..... 8

STATUTE:

National Labor Relations Act as amended, 29 U.S.C. § 151 et seq.:
§ 1 ..... 4, 6
§ 7 .....2, 3, 4, 5, 7, 8, 12
§ 8(a)(1) ..... 2, 7
§ 8(a)(5) .....6, 7, 9, 10
§ 8(d) ..... 6, 7

MISCELLANEOUS:

H.R. Rep. No. 1147, 74th Cong., 1st Sess. ..... 9
93 Cong. Rec. 3835 (Sen. Taft) ..... 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-1637

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

---

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

## REPLY BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, RESPONDENT

---

### ARGUMENT

In *Labor Board* v. *Le Tourneau Co.*, 324 U.S. 793, 796-797, 802-804 (decided with *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793), this Court held

that a plant rule, such as that here, imposing a blanket prohibition on employee distribution of union literature in the non-working areas of their plant and during non-working time, unlawfully interferes with the § 7 right "to self-organization, to form, join, or assist labor organizations" in violation of § 8(a)(1) of the National Labor Relations Act, as amended, unless justified by "special circumstances [that] make the rule necessary to maintain production or discipline."

The Company does not challenge *Le Tourneau*. Nor does it claim that its absolute ban on such distributions is justified by the "special circumstances" referred to there. Instead the Company would distinguish *Le Tourneau* on the ground that its holding was "derived from and applicable to [employer] unilaterally imposed no-distribution rules," whereas in this case the no-distribution rule is encompassed in a collective agreement between the Company and the employees' authorized representative. The basis offered for this distinction is that the agreement works a valid "waiver" of the employee right. Co. Br. p. 4. The Company's waiver argument rests on the premise that "numerous other important rights of employees protected by Section 7 may be waived", and that "there is no basis whatever to be found in the Act for [a] distinction" pursuant to which "distribution rights secured by that same Section 7 may not be waived by the statutorily authorized bargaining representative." Co. Br. p. 18.

The Board's response (Bd. Br. p. 8) is to acknowledge that "the employees' representative, the Union, is authorized to engage in collective bargaining on their behalf and to waive certain rights—for example, the right to strike," since "union and employee interests

are one in the context of concerted efforts to achieve economic advantage;" but that:

> "By contrast, the rights to distribute materials and to solicit support in organizing for collective bargaining are rights that individual employees exercise in choosing whether to be represented by a union, and in re-evaluating their bargaining agent. '[T]he rationale of allowing waiver * * * disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse.' "

As our opening brief shows, we agree with the Board that the § 7 right recognized in *Le Tourneau* can not be waived, but for different reasons. And, we, of course, disagree with the Company's reasoning and with the conclusion it would draw. This reply brief is therefore devoted to demonstrating that neither the Board, nor the Company, analyze the problem presented correctly.

1. We begin from the proposition, implicit in the fundamental principle that sovereignty resides in Congress, rather than in employers, unions or any other private party that:

> "[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. * * * Where a private right is granted in the public nterest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704.

See also, e.g., *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356; *Schulte* v. *Gangi*, 328 U.S. 108; *Lear Inc.* v. *Adkins*, 395 U.S. 653.

(a) The statutory policy here, as stated in *Le Tourneau*, is to protect the right of employees to utilize their non-working time to distribute union literature so long as they do so in non-working areas of the plant at which they are employed.

The major purpose of the Act is, in the words of § 1, to "encourag[e] the practice and procedure of collective bargaining by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing." Accordingly, employer action which would "weaken or destroy" § 7 rights (*NLRB* v. *Burnup & Sims*, 379 U.S. 21, 23-24), without "legitimate and substantial business justification" (*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378) is prohibited. The Act was intended to, and has the effect of, reducing the common law powers and perquisites of employers. The most notable instance is the restriction it imposes on their right to hire and fire for good reason, bad reason or no reason at all. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46. But this is not the full extent of the Act's effect.

The Board and this Court have been quick to perceive that it was in Congress's contemplation that "inconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining." *Republic Aviation*, 324 U.S. at 802 n. 8. In the NLRA context as in maritime law, common law property concepts, whose roots may be

traced "to a heritage of feudalism" are not controlling "in an industrialized urban society." *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625, 631-632. The rights of an employer who "opens up his property" to employees covered by the Act are "circumscribed by [their] statutory * * * rights * * *. Cf. *Republic Aviation Corp.* v. *National Labor Relations Bd.,* 324 U.S. 793, 796." *Marsh* v. *Alabama,* 326 U.S. 501, 506. For "even constitutionally protected rights * * * may not be used as levers for obtaining objectives proscribed by" federal law. *Ford Motor Co.* v. *United States,* 405 U.S. 562, 576 n. 11.

In short, as expressly recognized in *Thomas* v. *Collins,* 323 U.S. 516, 533-534, § 7 is the direct analogue of the First Amendment. And the holding in *Le Tourneau* follows directly from that of *Schneider* v. *State,* 308 U.S. 147, 161. Since the employer has of his own volition opened up his property to his employees, their statutory right to distribute union literature during non-working time and in non-working areas, is the same as the constitutional right of every citizen to distribute leaflets on public thoroughfares.

**(b)** *Le Tourneau* struck a balance between the employee right to distribute union literature and the employer's property and disciplinary rights. The Company argues that there is an added factor in the balance here—the collective agreement encompassing the blanket no-distribution rule. Co. Br. pp. 12-18, 21-30.[1]

---

[1] While acknowledging that the availability of "alternative means of communications" cannot validate an otherwise invalid unilaterally imposed blanket no-distribution rule, the Company argues that such other means of communication are relevant where

To be sure, it is a policy of the Act, as stated in § 1, "to encourage the 'practice and procedure of collective bargaining' as a means of resolving labor disputes." While this Court has been solicitous of this policy of free collective bargaining (e.g. *Porter Co.* v. *NLRB*, 397 U.S. 99) it has squarely rejected the view that §§ 8(a)(5) & (d) can be read to mean that Con-

---

the rule is embodied in a collective agreement. This is wrong for two reasons.

First, as we show in the text, the fact that a no-distribution rule is contained in a collective agreement does not change the calculus of competing considerations. Second, this argument rests on a misreading of this Court's decisions in *Babcock & Wilcox* v. *Labor Board*, 351 U.S. 105 and *Labor Board* v. *United Steelworkers*, 357 U.S. 357. As Judge Clark explained for the Second Circuit in *NLRB* v. *United Aircraft Corp., Pratt & Whitney Air Div.*, 324 F.2d 128, 131, cert. denied 376 U.S. 951:

> "Republic Aviation Corp. v. N. L. R. B., supra, 324 U.S. 793, 803, n. 10, with its clear approval of Peyton Packing Co., supra, 49 NLRB 828, 843-844, is strong authority for the position that the consideration of available alternatives is not required. N. L. R. B. v. Babcock & Wilcox Co., supra, 351 U.S. 105, while holding that nonemployee organizers could be forbidden to solicit on company property when reasonable alternatives were available, made it clear that the employees in exercise of their rights are not to be judged by the same standards as nonemployees. Further, it cites Republic Aviation Corp. v. N. L. R. B., supra, 324 U.S. 793, as controlling with regard to employees. The third case, N. L. R. B. v. United Steelworkers of America, CIO, supra, 357 U.S. 357, 362, did not involve the validity of a no-solicitation rule, but rather the 'very narrow and almost abstract question' whether, when an employer engages in antiunion solicitation in a manner forbidden to his employees by an otherwise valid no-solicitation rule, it is an unfair labor practice to enforce the rule against them. In this context the Court held the consideration of available alternatives to be relevant. This is clearly distinguishable from a case where the justifiableness of the no-solicitation rule is in question, rather than the propriety of the employer's use of means he had forbidden to the employees."

gress intended the products of "collective bargaining" to supersede public law. "[T]here are limits to what a union or an employer may offer to extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws. *Teamsters Union* v. *Oliver,* 358 U.S. 283, 296; *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 399-400." *United Mine Workers* v. *Pennington,* 381 U.S. 657, 665. *A fortiori* it does not mean that the parties may by agreement nullify the rights enacted by Congress in §§ 7 & 8(a)(1) to guarantee the viability of the entire system created by the Act. Yet that is the precise effect of the agreement here, because it nullifies the statutory "right [of employees] fully and freely to discuss" union affairs (*Thomas* v. *Collins,* 323 U.S. at 533), as declared in *Le Tourneau,* which is a cornerstone of the democratic process decreed by Congress for governing the industrial community. For that reason, it would undermine rather than support "the practice and procedure of collective bargaining" to permit a waiver of that right.

(c) This Court's decisions are uniform in their appreciation that the parties can not utilize the authority granted in §§ 8(a)(5) & (d) to "contravene the statutory policy" (*Brooklyn Savings Bank,* 324 U.S. at 704) of the Act by nullifying rights accorded by § 7 and safeguarded by §§ 8(a)(1)-(3). Consistent with the approach of *Brooklyn Savings Bank,* in *Radio Officers* v. *Labor Board,* 347 U.S. 17, 47 (1954) the Court held that:

> "The employer could not, without violating section 8(a)(3), discriminate in wages solely on the basis of [union] membership even though it had executed a contract with the union prescrib-

> ing such action * * * Such discriminatory contracts are illegal and provide no defense to an action under Section 8(a)(3)."

See also *Wallace Corp.* v. *Labor Board*, 323 U.S. 248, 256; *Labor Board* v. *Rockaway News*, 345 U.S. 71, 78-79; *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 104-107; *Garment Workers* v. *Labor Board*, 366 U.S. 731, 736-737.

Where agreements varying the scope of statutory rights have been upheld, this has been done on the ground that the agreement comported with rather than "contravene[d] the statutory policy" of the NLRA. Both the Board (Bd. Br. pp. 11-12) and the Company (Co. Br. p. 18) rely on two classes of cases—those dealing with the right to strike during the term of a contract, e.g. *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, and with the scope of bargaining during the term of an agreement, e.g. *Labor Board* v. *American Nat'l. Ins. Co.*, 343 U.S. 395—for their extravagant view of the extent to which collective agreements can work waivers of § 7 rights.

The no-strike-clause cases demonstrate the validity of our analysis, rather than undermine it. The House Report on the Wagner Act stated:

> "As has frequently been stated, collective bargaining is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the employer." H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.

See also *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 187, 237.

And as Senator Taft added in 1947, "we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, *when a contract has expired and neither side is bound by a contract.*" 93 Cong. Rec. 3835, emphasis added; quoted in *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234-35, n.13.

Thus, after the consummation of an agreement the push of the law is to promote stability by restricting the occasions for strife. Section 203(d) promotes this end by encouraging grievance and arbitration procedures. Section 301 serves the same function by making collective agreements enforceable in court. And § 8(d) of the Act, as the Board stated in *C & S Industries*, 158 NLRB 454, 457, embodies the "statutory intent to stabilize during a contract term agreed-upon conditions of employment." This is the basis for the validation of no-strike commitments.

By the same token, *American Nat'l. Ins.* does not permit the utilization of § 8(a)(5) to waive rights guaranteed by other sections of the Act. It holds that § 8(a)(5), the only section of the Act relevant to the problem there presented, does not enact a *per se* ban on management functions' clauses. In so doing the Court noted:

> "Counsel for the Board do not contend that a management functions clause covering some conditions of employment is an illegal contract term.[15]

---

"[15] Thus we put aside such cases as National Labor Relations Board v. National Maritime Union, 175 F2d 686 (CA2d Cir. 1949) (bargaining for discriminatory hiring hall clause), where a party bargained for a clause violative of an express provision of the Act" 343 U.S. at 405.

Thus, *American Nat'l. Ins.* defines the content of the duty to bargain embodied in § 8(a)(5), and does so in a manner which accepts the proposition that § 8(a)(5) does not permit "clauses violative of an express provision of the Act." It does not sanction such clauses.

There are *no* cases in *this* Court which hold that a right created by Congress in the public interest, may be nullified by a private collective bargaining agreement.[2] And while there have been cases by the Board and the lower courts which, speaking the language of waiver, have held that because of the terms of a collective bargaining agreement a particular statutory right is unenforceable (Co. Br. pp. 4-16), these have not come to grips with the principle of sovereignty enunciated in *Brooklyn Savings Bank*. The results in some can perhaps be justified by a more precise analysis of the right involved, compare our discussion of *American Nat'l. Ins., supra*. But they cannot be justified under the rubric, sometimes enunciated, that cer-

---

[2] The court below in *Armco Steel Corp.* v. *NLRB*, 344 F.2d 621 (C.A. 6), the precedent most heavily relied on in its opinion in this case, based its decision on the view that "contractual waiver of rights of equal or greater significance [than involved herein] has been upheld" (*id.* at 624). But none of the cases cited in *Armco* involved a waiver of statutory rights. Indeed, in one of the cases cited, *Radio Officers*, 347 U.S. 17, a contract limiting the right to be free of discrimination, as that term is defined in § 8(a)(3), was held to be unlawful. Of the others, only one even arguably dealt with a waiver of statutory rights, *Mastro Plastics*, 350 U.S. 270, discussed at p. 9 *supra*.

Of particular interest is *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, cited at 344 F.2d 625. That case involved bargaining about *contractual* seniority rights. On the other hand, where this Court has dealt with the statutory rights of veterans, it has said, in accord with the principle in *Brooklyn Savings Bank:*

> "[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which

tain NLRA rights are "fundamental" (and therefore not subject to waiver), whereas other rights are "economic" (and hence nonfundamental and waivable). Congress drew no such distinction in the Act.[3] The varying results which the courts of appeals, and indeed over the years the Board, have reached with respect to the problem in this case is itself a caution as to the efficacy of this analysis.[4]

---

Congress has secured the veteran under the [Veterans' Preference] Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285; *Accardi* v. *Pennsylvania R.R. Co.*, 383 U.S. 225, 229.

[3] In *United Aircraft Corp.* v. *NLRB*, 440 F.2d 85, 95-97 (C.A. 2), the court considered the right to be free from anti-union discrimination to be fundamental and non-waivable, but held that a regulation of the time, place and manner of soliciting union membership on company property was nonfundamental and thus subject to the bargaining process so long as reasonable access to company property for that purpose is preserved. That analysis is consistent with our view, pp. 12-14, *infra*, as to what matters are bargainable, as well as with the Board's decision herein, because the rule here was not thus limited.

The same court's decision in *NLRB* v. *Spun-Jee Corp.*, 385 F.2d 379, 384, (C.A. 2) relied on at Co. Br. p. 18, while using the term "waiver" actually represents a failure by the charging union to trigger the employer's bargaining obligation. Any doubt on this score is removed by *Spun-Jee's* reliance on this Court's decision in *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292. That case would, therefore, be in point only if the union here had filed an unfair labor practice charge without requesting an opportunity to distribute literature.

[4] The Company too, at an early point in its discussion, embraces the fundamental/nonfundamental distinction, asserting, not surprisingly, that the right which it violated was not fundamental. Co. Br. pp. 5-7. However, by the end of the argument, the Company itself recognizes that "to distinguish economic gain from organizational activity is a distinction without a difference * * *." Co. Br. p. 20.

In sum, the only approach to this problem which conforms to the policy of the Act is that of the Eighth Circuit in *International Ass'n. of Mach. & A. Wkrs. Dist. No. 9* v. *NLRB*, 415 F.2d 113 (C.A.8). That court determined that the test of the legality of a collectively bargained provision is whether it imposes a "material restriction on [a statutory] right":

> "We recognize, as do the Sixth and Seventh Circuits, the desirability of promoting stability in collective bargaining relationships, but we believe that Article XV, Section 2, goes beyond that objective by prohibiting employees from exercising their right to attempt to change or support their current bargaining agent through the distribution of literature in nonwork areas during nonwork time. We believe such a prohibition to be contrary to the letter and spirit of the Act. Article XV, Section 1, imposes no material restriction on such right and is not violative of the Act." *Id.* at 115.

Article XV, § 2, which was held to be illegal because it materially interferred with statutory rights, is indistinguishable from the provision on which the Company relies here. See *id.* at 114.

2. All of this is not to say that there is no room whatever for collective bargaining on the subject of the distribution of union literature in plants. We have stressed the analogy between this § 7 right and the constitutional right to distribute literature on public thoroughfares. In the latter context this Court has stated:

> "Our cases make [it] clear, * * * that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted. For example, two parades cannot march on the same street simultaneously,

and government may allow only one. *Cox* v. *Hampshire,* 312 U.S. 569, 576 (1941). A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox* v. *Louisiana,* 379 U.S., at 554. * * *

The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' * * * The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford,* 408 U.S. 104, 115-116, (footnotes omitted).

The rule stated in *Grayned* is indistinguishable from that stated in *Le Tourneau.* Both provide scope for practical adjustments of the competing interests tailored to particular circumstances. Thus, regulation of distributions at the work place or upon thoughfares implicate similar interests and the governing public law is in all essential respects the same. It follows, by a parity of reasoning, that an employer acting alone, or an employer and a union acting by agreement, like a local government, must in the regulations they adopt, abide by the further principle stated in *Grayned,* 408 U.S. at 116-117 (footnotes omitted):

"Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . .' Free expression 'must not, in the guise of regulation, be abridged or denied.' "

Thus, the Board correctly decided that the no-distribution rule maintained in this case was illegally overbroad since it was not "narrowly tailored to further the [Company's] legitimate interest." Under the NLRA, as under the Constitution, "[f]ree expression 'must not, in the guise of regulation, be abridged or denied' ". A collective agreement may "vary the protections" for the distribution of union literature afforded by § 7, within the limits already noted, "but it may not substantially abrogate employees' rights grounded" in that provision. Cf. *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37, 44.

3. The Company asserts that the Union "presumably receiv[ed] a *quid pro quo* in return for th[e] waiver which result[ed] in benefit to its unit members * * *" (Co. Br. p. 23), and objects that it is unfair to deprive the Company of the benefit of its bargain. A complete answer on this record is that no *"quid pro quo"* is identified although the Company "presumably" (*id.*) knew what it was giving up, if anything. And the answer in principle is that one private party does not gain a privilege to violate the law or to circumvent some other public policy by giving up something to another private party. See, e.g., the cases cited at p. 8 *supra*. It occurs not infrequently in labor-management relations that a particular term for which unions and employers have bargained and which benefits one of them is ultimately determined to be unlawful. The courts have not thereupon found themselves imprisoned by the stark choice between enforcing the illegal term and setting aside the entire agreement. Rather, as Mr. Justice Jackson held for this Court in *Labor Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, 79:

"The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can here."

## CONCLUSION

For the reasons stated herein and in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D.C. 20036

RONALD H. JANETZKE
1361 Office Park Drive
Kettering, Ohio 45439

*Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Respondent*

FILED
MAR 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1637

THE MAGNAVOX COMPANY OF TENNESSEE,

*Petitioner*

versus

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR REHEARING

GEORGE K. MCPHERSON, JR.
DANIEL M. SHEA

*Attorneys for Petitioner*
SMITH, CURRIE & HANCOCK
1400 Fulton National Bank Building
Atlanta, Georgia 30303

## INDEX

REASONS FOR GRANTING THE PETITION. 1

CONCLUSION..... 6

CERTIFICATE OF COUNSEL..... 7

## CITATIONS

Cases:

*Armco Steel Corporation v. National Labor Relations Board*, 344 F.2d 621 (6th Cir., 1965)..... 4

*International Association of Machinists and Aerospace Workers, District No. 9 v. National Labor Relations Board*, 415 F.2d 113 (8th Cir., 1969).. 4

*Mason & Hanger-Silas Mason Company v. National Labor Relations Board*, 405 F.2d 1 (5th Cir., 1968)..... 4

*Mastro Plastics Corp. v. Labor Board*, 350 U. S. 270 2

*National Labor Relations Board v. Gale Products, Division of Outboard Marine Corp.*, 337 F.2d 390 (7th Cir., 1964)..... 4

*National Labor Relations Board v. Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir., 1968).... 4

*Textile Workers v. Lincoln Mills*, 353 U.S. 448.... 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

---

No. 72-1637

---

THE MAGNAVOX COMPANY OF TENNESSEE,

*Petitioner*

versus

NATIONAL LABOR RELATIONS BOARD

---

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## PETITION FOR REHEARING

---

The Petitioner herein respectfully moves this Court for an Order clarifying the decision in this case rendered on February 27, 1974. In support of this Motion, Petitioner states the following:

## REASONS FOR GRANTING THE PETITION

In its Opinion on February 27, 1974 this Court, Justice Douglas delivering the Opinion of the Court, held that the Company's contractual prohibition of distribution of literature on Company property might interfere with the employees' rights under Section 7 of the National Labor Relations Act "to form, join, or assist labor organizations," or to refrain from such activities, and such rights, unlike those in the economic

area, cannot be waived by the employees' collective bargaining representative.

In so ruling, the Court stated that:

> The Union may, of course, reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the *quid pro quo* for the employer's acceptance of the grievance and arbitration procedure. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455. Such agreements, however, rest on "the premises of fair representation" and presuppose that the selection of the bargaining representative "remains free." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 289. In that case we held that the waiver of the "right to strike" did not embrace a waiver of the right to strike "against unlawful practices destructive of the foundation on which collective bargaining must rest." *Id.*, at 281. *We dealt there with rights in the economic area. Yet as the Fifth Circuit held in the Mid-States case a different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved—whether to have no bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative.* (p. 3). (Emphasis added)

By the language emphasized above, it appears that the Court is ruling that a company and a union are permitted to waive any right to distribute literature on company property, except when that literature involves the employees' wish "to have no bargaining representative, or to retain the present one, or to obtain a new one." In fact, the concurring and dissenting opinion presumes as such:

> The Board held, and I presume the Court agreed, that the Union could waive any right that the employees might have to distribute Union institutional literature. The only question in this case relates to the waivability of rights to distribute literature *regarding the proposed selection, retention, or displacement of the collective-bargaining agent.* (fn. p. 3) (Emphasis added)

However, the Order of the National Labor Relations Board which becomes operative as a result of the reversal of the Sixth Circuit decision prohibits union waiver of distribution rights of employees of all literature—even that which is, like the right to strike, concerned solely with matters economic in nature.[1]

The Board's Order states that the Company should:

> Cease and desist from maintaining, giving effect to, or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, *or other matters related to the exercise by employees of their Section 7 rights.* (Emphasis added)[2]

Thus the Board's Order appears to be in direct conflict with the decision of this Court. In fact, it should be noted that the Board's Order in this case goes far beyond

---

[1] Examples of such literature which the Board prohibits the union from waiving distribution of on company property would be notices of union meetings, announcements of arbitration awards or grievances filed, or handouts relating to the status of negotiations between the Company and the Union. Distribution of such literature, while an exercise of Section 7 rights, does not involve the question of fair representation versus self-interest of a union in perpetuating itself as the bargaining representative.

[2] Petition for Writ of Certiorari, at p. 25.

the remedy approved or sanctioned by any Court of Appeals presented with the question of union waivability of employee distribution rights.[3]

The lower court cases cited by the Court in its decision[4] involved literature pertaining to the "proposed selection, retention, or displacement of the collective-bargaining agent." The only Court of Appeals case, other than the instant case,[5] concerned with solicitation or distribution not dealing with "the proposed selection, retention, or displacement of the collective-bargaining agent" was *Mason & Hanger-Silas Mason Company* v. *National Labor Relations Board*, 405 F.2d 1 (5th Cir., 1968). In that case, the United States Court of Appeals for the Fifth Circuit distinguished its decision in *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir., 1968), the case cited by this Court in its present decision. Accordingly, the Fifth Circuit allowed enforcement of the contractual prohibition. 405 F.2d 1, 5.

Because the distribution of literature in the instant case did not involve selection, rejection, retention or

[3] While the Board would permit waiver of distribution of "institutional" literature, this is a term so vague in definition as to be incapable of enforcement. Certainly, it would seem much more appropriate to determine waivability on the basis of whether the purpose of the literature involves choice of representative in the context of an attempt to retain or displace the incumbent bargaining agent.

[4] *International Association of Machinists and Aerospace Workers, District No. 9* v. *National Labor Relations Board*, 415 F.2d 113 (8th Cir., 1969); *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir., 1968). Although not cited by the Court, *Armco Steel Corporation* v. *National Labor Relations Board*, 344 F.2d 621 (6th Cir., 1965) and *National Labor Relations Board* v. *Gale Products, Division of Outboard Marine Corp.*, 337 F.2d 390 (7th Cir., 1964), involved distribution of the same type of literature.

[5] Appendix to the Briefs, pp. 33-35.

displacement of the bargaining representative, and because of the conflict between the Court's decision as interpreted from the above-cited language and the Board's Order, Petitioner is unclear as to what its legal responsibilities are under the decision of this Court as to distribution of literature the subject matter of which, while involving Section 7 rights, is, like the right to strike, economic in nature.[6]

It is Petitioner's position that waiver of employee rights to distribute literature which does not relate to choice of bargaining representative should be allowed since no legitimate question of fair representation by the Union would be raised by the waiver. Thus, Petitioner contends that the portion of the Board's order prohibiting waiver of distribution rights of employees of literature relating to matters other than selection or rejection of the bargaining agent should not be enforced, and that this Court should so order.

---

[6] It is Petitioner's belief that distributions of economic literature such as grievance announcements or status of negotiation reports, are more prominent, probable and vastly more numerous in the day to day union activities of employees than distributions of literature dealing solely with the subject of selection, retention or displacement of the bargaining representative. Waivability of distribution of such economic literature is, therefore, a question of major significance in employer-union relations which should be recognized and answered by the Court in this case; particularly since the specific literature involved in the case was of the economic variety.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant a Rehearing of its decision rendered February 27, 1974 for the purpose of providing guidance to the parties as to whether or not a union can waive rights of employees to distribute literature the subject matter of which does not involve selection, retention, or displacement of the collective bargaining agent; but which, like the right to strike, concerns matters economic in nature.

Respectfully submitted this 22d day of March, 1974.

SMITH, CURRIE & HANCOCK

George K. McPherson, Jr.

Daniel M. Shea

*Attorneys for Petitioner*, The Magnavox Company of Tennessee

## CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

George K. McPherson, Jr.
Attorney for Petitioner
The Magnavox Company of
Tennessee

# NATIONAL LABOR RELATIONS BOARD *v.* MAGNAVOX COMPANY OF TENNESSEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1637. Argued January 14-15, 1974—
Decided February 27, 1974

At the time respondent company entered into a collective-bargaining agreement with a union, respondent had a blanket rule against distribution by employees of literature on company property. The collective agreement and subsequent contracts authorized the company to issue fair and nondiscriminatory rules for maintaining orderly conditions on plant property and also provided for bulletin boards for union notices. The union ultimately challenged the rule's validity, and upon denial of its request for a change, filed unfair-labor-practice charges against respondent; which the National Labor Relations Board (NLRB) upheld. The Court of Appeals denied enforcement of the NLRB's order, finding that the union had waived the on-premises distribution ban. *Held:* Respondent's ban might interfere with the employees' rights under § 7 of the National Labor Relations Act "to form, join, or assist labor organizations," or to refrain from such activities, and such rights, unlike those in the economic area, cannot be waived by the employees' collective-bargaining representative. The bulletin-board provision did not afford an adequate alternative, since it did not give the union's adversaries equal access of communications with their fellow employees. Pp. 324-327.

474 F. 2d 1269, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed an opinion concurring in part and dissenting in part, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 327.

*Peter G. Nash* argued the cause for petitioner. With him on the brief were *Solicitor General Bork, John S. Irving, Patrick Hardin,* and *Norton J. Come.*

*George K. McPherson, Jr.*, argued the cause and filed a brief for respondent. *Winn Newman* and *Ruth Weyand* filed a brief for the International Union of Electrical, Radio & Machine Workers, AFL-CIO, petitioner below, urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1954, the International Union of Electrical, Radio, and Machine Workers (IUE) became the collective-bargaining representative of respondent's employees. At that time respondent had a rule prohibiting employees from distributing literature on any of its property, including parking lots and other nonwork areas. The collective agreement authorized the company to issue rules for the "maintenance of orderly conditions on plant property," provided the rules were not "unfair" or "discriminatory." It also provided that bulletin boards would be available for the posting of union notices, subject to the company's right to reject "controversial" notices. All subsequent contracts contained similar provisions. Throughout the period since 1954 respondent has prohibited employees from distributing literature even in nonworking areas during nonworking time.

In due course, the IUE challenged the validity of the company's rule and requested that the rule be changed. The request was denied and the IUE filed charges against respondent for unfair labor practices in violation of § 8 (a) (1) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. § 158 (a) (1). The Board held for the IUE, following its earlier decision in *Gale Products*, 142 N. L. R. B. 1246, where it had said:

> "Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share com-

mon interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Id.*, at 1249.

The remedy in *Gale Products* ran in favor of employees whose distribution project was *to reject* a union representative. The Board in the present case, however, broadened the relief to embrace those who wanted *to support* a union representative, 195 N. L. R. B. 265. The Court of Appeals denied enforcement of the Board's order, because in its view the union had waived the ban on on-premises distribution of literature and had the authority to do so. 474 F. 2d 1269. The case is here on petition for certiorari which we granted because of the conflict between this decision of the Sixth Circuit Court of Appeals with that of the Eighth in *International Association of Machinists* v. *NLRB*, 415 F. 2d 113, and that of the Fifth in *NLRB* v. *Mid-States Metal Products*, 403 F. 2d 702.

Employees have the right recognized in § 7 of the Act "to form, join, or assist labor organizations" or "to refrain" from such activities. 29 U. S. C. § 157. We agree that a ban on the distribution of union literature or the solicitation of union support by employees at the plant during nonworking time may constitute an interference with § 7 rights. The Board had earlier held that solicitation outside working hours but on company property was protected by § 7 and that a rule prohibiting it was "discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *In re Peyton Packing Co.*, 49 N. L. R. B. 828, 843–844. We approved that ruling in *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 801–803. No contention is made here that considerations of production or dis-

cipline make respondent's rule necessary. The sole issue concerns the power of the collective-bargaining representative to waive those rights.

The union may, of course, reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the *quid pro quo* for the employer's acceptance of the grievance and arbitration procedure. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 455. Such agreements, however, rest on "the premise of fair representation" and presuppose that the selection of the bargaining representative "remains free." *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 280. In that case we held that the waiver of the "right to strike" did not embrace a waiver of the right to strike "against unlawful practices destructive of the foundation on which collective bargaining must rest." *Id.*, at 281. We dealt there with rights in the economic area. Yet, as the Fifth Circuit held in the *Mid-States* case, a different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved—whether to have no bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative. 403 F. 2d, at 705. The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights. For Congress declared in § 1 of the Act that it was the policy of the United States to protect "the exercise by

workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U. S. C. § 151.

It is argued that the use of the bulletin board is a fair substitute. But as the Fifth Circuit said in the *Mid-States* case the bulletin board may be an adequate medium for "preserving the status quo" and yet not give a union's adversaries "equal access to and communication with their fellow employees." 403 F. 2d, at 705.

Moreover, a limitation of the right of in-plant distribution of literature to employees opposing the union does not give a fair balance to § 7 rights, as the Board ruled in the present case. For employees supporting the union have as secure § 7 rights as those in opposition. The Board's position, as noted, has not always been consistent. But its present ruling is, we think, quite consistent with § 7 rights of employees. It is the Board's function to strike a balance among "conflicting legitimate interests" which will "effectuate national labor policy," including those who support *versus* those who oppose the union. *NLRB* v. *Truck Drivers Union*, 353 U. S. 87, 96. Moreover, as respects employers, the rights of solicitation of employees by employees concerning § 7 rights are not absolute. As we noted in *Republic Aviation Corp.* the Board may well conclude that considerations of production or discipline may make controls necessary. No such evidence existed here and the trial examiner so found. Accordingly, this is not the occasion to balance the availability of alternative channels of communication* against

*IUE, in a brief supporting the Board's position, states there are some 2,300 employees in the bargaining unit who live scattered over a two-state area covering more than 100 square miles. The plant is located in Greenville, Tennessee. Some workers live 30 miles distant in Johnson City, Tennessee, and others live in Morrison, North Carolina. It claims that handing out leaflets at the plant gate is impractical as cars enter or exit four abreast at fast speeds. We mention

a legitimate employer business justification for barring or limiting in-plant communications.

*Reversed.*

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

To the extent the Court holds that a union cannot contractually waive the right of disaffected employees to distribute in nonwork areas and during nonwork time literature advocating the displacement of the incumbent collective-bargaining representative, I am in complete agreement. This is the essence of the Board's decision in *Gale Products*, 142 N. L. R. B. 1246. But it seems to me wholly inconsistent with the letter and spirit of the National Labor Relations Act to relieve the union of its promise that its own self-serving literature will not be so distributed in the plant.

Although the union is deemed to represent all employees in the bargaining unit, both pro-union and anti-union, and may waive important § 7 rights in the course of collective bargaining, presumably in return for management concessions on other fronts, this authority cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests. The Board stated the point succinctly in its decision in *General Motors Corp.*, 158 N. L. R. B. 1723, 1727:

> "[T]he employees, by once selecting the union as their representative, do not forfeit their fundamental right to change their representative at appropriate times. When a union acts to abridge that right

---

these statements not to resolve a controversy, but to indicate at least a part of the range of any inquiry into the need for in-plant solicitation if § 7 rights are to be protected.

> in the manner presented in this case, it is essentially benefiting the union *qua* union, to the detriment of the employees it represents."

Any such attempted waiver of the rights of others is so clearly in the union's self-interest of perpetuating its status as the bargaining agent, and at odds with the interests of the disaffected employees, that "the premise of fair representation" underlying contractual waivers of § 7 rights is wholly undermined. *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 280.

Judicial nullification of contractual concessions, however, is contrary to what the Court has recognized as "[o]ne of [the] fundamental policies" of the National Labor Relations Act—"freedom of contract." *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 108 (1970). "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). Contractual waivers against a union's own interests are seldom if ever gratuitously granted in the give and take of the collective-bargaining process. In return, the union typically exacts some form of *quid pro quo* from the management negotiators. Since it is usually impossible to identify the consideration given in return for a particular union concession, the result of nullifying a union's agreement to waive the § 7 rights of its supporters will necessarily be to deprive management of the benefit of its bargain and to leave the union with a windfall. This sort of invalidation of bargained-for concessions does not promote stability in the collective-bargaining process and must certainly have a negative effect on labor-management relations. For this reason, the Board and the courts should

not relieve the parties of the promises they have made unless a contractual provision violates a specific section of the Act or a clear underlying policy of federal labor law.

In *Gale Products* the Board correctly determined that the union could not waive the distribution rights of employees who sought to distribute literature advocating the ouster of the incumbent union; for the clear policy of federal labor law forbids either the union or the employer to freeze out another union or to entrench the incumbent union by infringing the § 7 rights of dissident employees. I see no justification, however, for the Board's extension of the *Gale Products* rule to prevent the union's waiver of the distribution rights of its supporters in the bargaining unit.*

The considerations that distinguish the waiver of supporters' distribution rights from the waiver of opponents' distribution rights were cogently stated by the Fifth Circuit in *NLRB* v. *Mid-States Metal Products*, 403 F. 2d 702, 705:

> "Where union and employee interests are one it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees. But the rationale of allowing waiver by the union disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and em-

*The Board held, and I presume the Court agrees, that the union could waive any right that the employees might have to distribute union institutional literature. The only question in this case relates to the waivability of rights to distribute literature regarding the proposed selection, retention, or displacement of the collective-bargaining agent.

ployees may be wholly adverse. Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative.

"A waiver of the right to solicit and distribute literature does not hamper the union as it does the union's adversaries. The union can communicate through the bulletin board, union meetings and the force of status as bargaining representative, enjoying an advantage in preserving the status quo. Its adversaries will not have equal access to and communication with their fellow employees."

In nullifying the union's promise to waive the literature-distribution rights of its own supporters, the Board and today the Court are upsetting the delicate balance achieved in the give and take of negotiations and presenting the union with an undeserved windfall. This nullification, at the behest of the union that made the promise, can only contribute to future instability in collective bargaining between labor and management.

One can, of course, envision exceptional circumstances in which the union supporters' access to and communication with their fellow employees in the bargaining unit might be so restricted that it would be extremely difficult, in the absence of their § 7 distribution rights, for them to respond to the arguments made in literature distributed by their opponents. In such a case, the waiver of the supporters' rights might result in such a distortion of the labor political process as to prevent the balanced presentation of the issues to the em-

ployees that national labor policy seeks to promote. This concern was aptly expressed by the Board in its *General Motors* decision, 158 N. L. R. B., at 1726:

> "[W]e recogniz[e] the salutary purpose of refusing to disturb concessions yielded by either party through the processes of collective bargaining even where such a concession may infringe upon rights guaranteed employees under Section 7 of the Act. . . . [T]he validity of a particular concession or waiver must depend upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver, or would unduly hamper the employees in exercising their basic rights under the Act." (Internal quotations omitted.)

Thus, if in the absence of § 7 distribution rights the union supporters would be incapable of adequately presenting their position to the employees in a representation controversy, a strong argument could be made that the union's agreement was contrary to a basic policy of the National Labor Relations Act and that, despite the negative effect on the bargaining process, the union's promise could not be effective.

In this case, however, there is no suggestion of such exceptional circumstances that would incapacitate the union's supporters in any dispute regarding the union's continued status as the collective-bargaining agent. It is clear from the record that the union supporters have access to the company bulletin boards; that they may still solicit support, although not distribute literature, in nonwork areas during nonwork time; and that they may distribute literature, and have done so in the past, at the gates of the plant. Thus, it is evident that the union supporters would not be disabled by this provision of

the collective-bargaining agreement from maintaining their end of the political discourse that national labor policy seeks to foster.

I cannot agree to a general rule that allows the Board to nullify the union's promise, contained in a collective-bargaining agreement, that its supporters will not distribute literature in the plant. For this reason, I dissent from the judgment and the opinion of the Court insofar as they hold that the union could not validly waive the distribution rights of the employees who support it.